IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1242

PLEASANT RICHARD TALLY
(a/k/a DICK TALLY),
Petitioner,

versus

WILLIAM P. JOHNSON, et. al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Bushrod Corbin Washington, Jr.
2509 Popkins Lane
Alexandria, Virginia 22306
(703) 765-8616
Member of the District of
Columbia Bar and the Supreme Court
of the United States

Carole Suzzanne Holman
Bank of Vienna Building
374 Maple Avenue East
Suite 302
Vienna, Virginia 22180
(703) 281-4321

Richard A. Straser
1320 Ft. Myer Drive
Suite 812
Arlington, Virginia 22209
(703) 525-3562

Attorneys of Record
for Petitioner

SCOFIELDS' QUALITY PRINTERS, P. O. BOX 53096, N. O., LA. 70153 - 504/822-1611

TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

TABLE OF AUTHORITIES

CASES CITED

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

CONSTITUTIONS CITED

STATUTES CITED

TABLE OF AUTHORITIES (Continued)

RULES CITED

TEXTS CITED

TABLE OF AUTHORITIES (Continued)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No.

PLEASANT RICHARD TALLY
(a/k/a DICK TALLY),
Petitioner,

versus

WILLIAM P. JOHNSON, et. al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Pleasant Richard Tally, prays that the Supreme Court of the United States issue a Writ of Certiorari to review the judgment of the U. S. Court of Appeals for the Fifth Circuit in Civil Action No. 77-2339, rendered on December 8, 1977, petition for rehearing and suggestion for rehearing *en banc* denied, January 6, 1978, affirming without opinion the judgment of the U. S. District Court for the Northern District of Georgia, Civil Action No. 77-359A, dismissing plaintiff's claim for relief under 42 *U.S.C.* 1983 for the reason that the state court judge was immune to suit.

OPINIONS BELOW

The judgment of affirmance without opinion of the United States Court of Appeals for the Fifth Circuit is reproduced as Appendix A, p. 1a; and the order of the Fifth Circuit denying the petition for rehearing and suggestion for rehearing *en banc* is reproduced as Appendix B, pp. 2a-3a.

Since the United States Court of Appeals for the Fifth Circuit adopted *verbatim* the decision of the U. S. District Court for the Northern District of Georgia by affirmance without opinion, the judgment and opinion of the U. S. District Court is reproduced as Appendix C, pp. 3a-7a; and the order denying plaintiff's motion to alter or amend the judgment is reproduced as Appendix D, p. 7a.

Appendices E, F and G are printed at pp. 8a-42a for the convenience of the Court and will be referred to within the text of this petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was made final by affirmance without opinion rendered on December 8, 1977; and the petition for rehearing and the suggestion for rehearing *en banc* was denied by order entered on January 6, 1978. This petition for a writ of certiorari was timely filed in the Supreme Court of the United States within ninety (90) days of January 6, 1978. The jurisdiction of the Supreme Court of the United States is invoked under 28 *U.S.C.* 1254(1) and Rule 19.1(b) of the Revised Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

1. Did affirmance without opinion by the panel of the U. S. Court of Appeals for the Fifth Circuit constitute error as a matter of law in that the holding of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), was disregarded; to wit, the substantive law of the State of Georgia defining what is "without jurisdiction" in orders of state court judges, as pronounced in *Coweta Bonding Company v. Carter*, 230 Ga. 585 (1976) and *In re Prisoners Awaiting Transfer*, 236 Ga. 516 (1976), was not applied by the U. S. District Court sitting in the forum state of Georgia in determining what is "in the clear absence of jurisdiction" for purposes of whether or not immunity applied to this Georgia state court judge in restraining the "fundamental, natural, inherent, most sacred and valuable right of any (Georgia) citizen", as defined in *Shaw v. Hospital Authority of Cobb County*, 507 F.2d 625 (C.A. Ga. 1975), and *Tyler v. Vickerey*, 517 F.2d 1089 (C.A. Ga. 1975)?

2. Did affirmance without opinion by the panel of the U. S. Court of Appeals for the Fifth Circuit constitute error as a matter of law in equating the facts pleaded in the amended complaint to the facts found in *Pierson v. Ray*, 386 U.S. 547 (1967), and *Williams v. Sepe*, 487 F.2d 913 (5th Cir. 1973), in total disregard of the mandates of *Conley v. Gibson*, 355 U.S. 41 (1957) and *Cook & Nichol, Inc. v. Plimsoll Club*, 451 F.2d 505 (5th Cir. 1971), when counsels for Appellant in the Brief on Appeal clearly demonstrated the distinction between "in

excess of jurisdiction", *Pierson v. Ray, supra,* not on point with the facts of the case at bar, and "in the clear absence of jurisdiction" factually well pleaded in the amended complaint of petitioner, using the instrument of state authority central to the issue presented, the order of the state court judge to prove the liability asserted under 42 *U.S.C.* 1983?

3. Did affirmance without opinion by the panel of the U. S. Court of Appeals for the Fifth Circuit constitute error as a matter of law in misapplying the test of judicial immunity as enunciated in *Bradley v. Fisher,* 80 U.S. 335 (1871), so that now there are no factual circumstances left open which may be pleaded where immunity would not apply, overruling *sub silentio Cross v. Byrum,* 348 F.Supp. 196 (S.D. Florida 1972), which reached the opposite conclusion of law on an identical motion to dismiss by a state court judge which was denied?

4. Has the panel of the U. S. Court of Appeals for the Fifth Circuit by affirmance without opinion overruled *sub silentio* the rule of law in *Ingram v. Dunn,* 383 F.Supp. 1043 (D.C. Ga.), *affirmed* 514 F.2d 1070 (5th Cir. 1974), wherein the court stated that the fundamental tenets of tort law have application in cases brought under 42 *U.S.C.* 1983, and claims under that statute are to be viewed against the background of tort liability which makes a man responsible for the natural consequences of his acts?

5. Did affirmance without opinion by the panel of the U. S. Court of Appeals for the Fifth Circuit con-

stitute error as a matter of law because *Ga. Code Ann.* 30-203, the temporary alimony statute, as fully construed by the Supreme Court of Georgia in *Lloyd v. Lloyd,* 183 Ga. 751 (1937), could not authorize the transfer of possession and control of a Georgia corporation as postulated by the U. S. District Court, which state decision by the highest appellate court in Georgia was not followed by the federal trial court sitting in the forum state of Georgia as mandated by *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938)?

6. Did affirmance without opinion by the panel of the U. S. Court of Appeals for the Fifth Circuit of the U. S. District Court's order constitute error of law in denying petitioner's motion to alter or amend the judgment dismissing the complaint when the U. S. District Court based its denial upon the reasoning that petitioner's remedy was an appeal of the state court proceeding, not a civil rights action against the state court judge, which reasoning contradicts the long-settled rule in civil rights actions brought under 42 *U.S.C.* 1983 that such suits are free of the requirement that state judicial or administrative remedies must first be exhausted as pronounced by this Court in *Lane v. Wilson,* 307 U.S. 268 (1939); *Monroe v. Pape,* 365 U.S. 167 (1961); and *McNeese v. Board of Education,* 373 U.S. 668 (1963); which settled doctrine was again recently approved by the U. S. Court of Appeals for the Sixth Circuit in *Lucarell v. McNair,* 453 F.2d 836 (6th Cir. 1972)?

7. Has the final judgment of the U. S. Court of

Appeals in *Pleasant Richard Tally v. William P. Johnson, et. al.* embarked the Fifth Circuit on a silent and defiant course 180 degrees removed from decisions previously rendered; namely, *Cross v. Byrum*, 348 F.Supp. 196 (S.D. Florida 1972); *Lynch v. Johnson*, 420 F.2d 818 (6th Cir. 1970); *Lucarell v. McNair*, 453 F.2d 836 (6th Cir. 1972); *Azar v. Conley*, 456 F.2d 1382 (6th Cir. 1972); and *Wade v. Bethesda Hospital*, 356 F.Supp. 380 (S.D. Ohio 1973), so that the Fifth Circuit will ultimately flounder by now persisting to place both U. S. circuits in direct conflict with each other in treating the same legal issue?

8. Did the final decision of the U. S. Court of Appeals for the Fifth Circuit by affirmance without opinion ignore the question brought to it on appeal, "What is meant by the term *subject matter*?", for purposes of deciding "jurisdiction" under Georgia law in the transfer, without *in rem* or *in personam* jurisdiction by civil court process, of possession and control of a Georgia corporation owned by more parties that those before the state court judge — "It is the judges' duty to decide all cases within their jurisdiction that are brought before them." — which is the only paraphrase of a single sentence in *Pierson v. Ray* applicable between this Court's decision in 1967 and the case at bar?

STATEMENT OF THE CASE

(A) The Proceedings Below:

Pleasant Richard Tally brought this civil action in the United States District Court for the Northern Dis-

trict of Georgia on March 2, 1977, against William P. Johnson, Homer Williams and Aubrey W. Gilbert under Title 42, *United States Code*, Section 1983, because these defendants in a state court proceeding for legal separation between Frances White Tally and Pleasant Richard Tally perpetrated the transfer by court order of a Georgia corporation, Style Crest Southeast Co., Inc., owned by more parties than the husband and wife before the state court judge (defendant Homer Williams owned 900 shares of Style Crest) without due process due to a lack of *in personam* or *in rem* jurisdiction of the corporation; and further, these defendants had the state court judge enjoin Pleasant Richard Tally's fundamental right to earn a living out of that corporation of which he was a better than one-third (1/3) shareholder with the result to deprive the "property" and "liberty" rights secured by the *U. S. Constitution* and the statute.

On March 28, 1977, Pleasant Richard Tally moved under Rules 15, 19, 20 and 21 to amend the complaint before answer or motion and to add as a party defendant the state court judge, Lamar H. Knight. The entire claim for relief as stated in the amended complaint is printed as Appendix E, pp. 8a-15a.

On April 4, 1977, William P. Johnson and Aubrey W. Gilbert moved the U. S. District Court to dismiss the claim for relief claiming a qualified privilege of immunity in that they were private attorneys acting in a state court proceeding and therefore not liable to suit under the statute. On April 4, 1977, Homer Williams moved for summary judgment (later construed as a motion to dismiss) claiming he was a private person

and therefore not amenable to suit under 42 *U.S.C.* 1983.

On April 22, 1977, Lamar H. Knight moved the U. S. District Court to dismiss the amended complaint under Rule 12(b)(6) claiming the doctrine of judicial immunity applied, citing *Pierson v. Ray*, 386 U.S. 547 (1967). The motion to dismiss of defendant Knight is printed as Appendix F, pp. 17a-18a.

On May 4, 1977, Pleasant Richard Tally traversed the assertion of judicial immunity or that *Pierson*, which stands for "in excess of jurisdiction", applied since the amended complaint and the response to the motion to dismiss of Pleasant Richard Tally *clearly* distinguished *Pierson* on its facts and showed the plaintiff's facts amounted to "in the clear absence of jurisdiction". The Responsive Brief to Knight's Motion to Dismiss is printed as Appendix G, pp. 26a-42a.

On June 3, 1977, the U. S. District Court under authority of Rule 12(b)(6) dismissed the amended complaint as to all the defendants for failure to state a claim upon which relief could be granted. The District Court in its order attached to the dismissal, Appendix C, pp. 4a-7a, found (1) that Pleasant Richard Tally owned 1,000 shares of Style Crest Southeast Co., Inc.; (2) Frances White Tally owned 1,000 shares of Style Crest; (3) Homer Williams owned 900 shares of Style Crest; (4) the interlocutory decree of separation between Frances White Tally and Pleasant Richard Tally, which petition for legal separation was drawn by defendant, William P. Johnson, which petition never mentioned the Georgia corporation, Style Crest

Southeast Co., Inc. or the respective shareholder interests therein was signed by state court judge, Lamar H. Knight; to wit, in the words of the District Court:

> "plaintiff's interest in Style Crest was awarded to Frances White Tally and Lamar H. Knight ordered plaintiff to refrain from entering the premises of the corporation." (R.-300).
>
> "Plaintiff claims that all the defendants conspired in the divorce proceeding to deprive him of the constitutional right to earn a living." (R.-300).

With the last statement, Petitioner is in agreement with the U. S. District Court; namely that "all the defendants conspired to deprive him of the constitutional right to earn a living", which finding of conspiracy is cognizable in the Fifth U. S. Circuit and actionable under 42 *U.S.C.* 1983. However, the District Court committed legal error in derogation of the mandates of *Conley v. Gibson*, 355 U.S. 41 (1957) and *Cook & Nichol, Inc. v. Plimsoll Club*, 451 F.2d 505 (5th Cir. 1971) in premising the dismissal under Rule 12(b)(6) upon the transfer of "plaintiff's interest in Style Crest", implying the transfer of personalty; namely the 1,000 shares of stock owned by Pleasant Richard Tally, when in fact, the court order of defendant Lamar H. Knight recites "transfer of possession and control of the corporation, Style Crest" (R.-166, 323).

The U. S. District Court, in error, found further "that *Ga. Code Ann.* 30-203, the temporary alimony statute, empowered the state judge to dispose of Pleasant

Richard Tally's share holdings in Style Crest." On June 13, 1977, Pleasant Richard Tally moved to alter or amend the judgment dismissing the claim for relief. The legal basis asserted by petitioner was the Supreme Court of Georgia's holding in *Lloyd v. Lloyd*, 183 Ga. 751, 189 S.E. 903 (1937), in which *Ga. Code Ann.* 30-203, the temporary alimony statute, was construed:

> " 'Alimony' is a technical word, theoretically restricted to personalty, and practically to money. It is payable out of the husband's estate, real as well as personal. *But the word never covers the estate itself.*" 189 S.E. 903, at 904.

Nowhere in *Ga. Code Ann.* 30-203, quoted *in toto* at (R.-308) is the state court judge, contra the District Court's finding, "empowered to make a disposition of plaintiff's share holdings in Style Crest", or transfer possession and control of a Georgia corporation, without due process of law, and without *in personam* or *in rem* jurisdiction of the Georgia corporation. Nowhere in *Ga. Code Ann.* 30-203 is the state court judge empowered to restrain Pleasant Richard Tally from pursuing his constitutional, fundamental right to earn a living usurping the powers of the corporation's shareholders and Board of Directors by depriving the corporation of the salesman "who effectively produced over 90% of the corporate accounts". (R.-53). In the language of the holding of the Supreme Court of Georgia in *Hood v. Hood*, 130 Ga. 610, 61 S.E. 471 (1908), "property (Style Crest Southeast Co., Inc.) must be subjected to the power of the court in some manner making it a thing proceeded against." The order of Lamar H. Knight, *for the first time*, mentions the

corporation, Style Crest. In deciding the motion to alter or amend the judgment, the U. S. District Court, on June 28, 1977, answered:

> "The plaintiff's remedy, assuming an error on the part of Judge Knight, was an appeal of the order, not a civil rights action against the judge", citing *Pierson v. Ray*, 386 U.S. 547 (1967) (R.-345).

Such error of law by the District Court on the motion to alter or amend is corrected by:

> It is no answer that the state has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked. *Monroe* v. *Pape*, 365 U.S. 167, p. 183, 81 S.Ct. 473, 5 L.Ed. 2d. 492 (1961) *quoted in Lucarell v. McNair*, 453 F.2d 836 (6th Cir. 1972), which latter case was rendered after *Pierson* v. *Ray*, *supra*. (R.-393).

Motions for award of attorneys fees by the defendants were properly and correctly denied by the District Court. See *Richardson v. Hotel Corp. of America*, 322 F.Supp. 579 (E.D. La. 1971), *aff'd* 468 F.2d 951 (5th Cir. 1972). Plaintiff's motion for stay of execution of costs pending appeal to the Fifth Circuit was granted on June 28, 1977.

On December 8, 1977, a panel of the United States Court of Appeals for the Fifth Circuit decided, *per curiam*, that the dismissal of Appellant's amended

complaint by the U. S. District Court under Rule 12(b)(6) of the Federal Rules of Civil Procedure should be affirmed without opinion.

On January 6, 1978, a panel of the United States Court of Appeals for the Fifth Circuit decided, without opinion, to deny the petition for rehearing and suggestion for rehearing *en banc*.

On January 11, 1978, Pleasant Richard Tally filed a motion to stay the mandate for costs pending a petition for a writ of certiorari to the United States Supreme Court which was granted by the Fifth Circuit Court of Appeals.

Here now is the petition of Pleasant Richard Tally to this Court.

(B) The Fundamental Constitutional Right of Pleasant Richard Tally in Issue:

It has been inaccurately asserted by counsel for Judge Lamar H. Knight that:

> "The issue of the property rights in the divorce action was litigated and resolved in the 1969 Coweta Superior Court action. This baseless attempt to relitigate what happened in 1969 should not result in an expense to the defendants . . ."
>
> "Considering the fact that the plaintiff in this action seeks damages from a judge, ignoring the well known doctrine of judicial immunity and considering the frivolous nature of this action, the suit is even more meritless and vexatious." (R.-341).

It has also been asserted by counsel for William P. Johnson that injury to personalty; namely, conversion of plaintiff's shares of stock governed by *Ga. Code Ann.* 3-1002 (R.-74) is herein involved.

Neither assertion is accurate.

"A denial by Defendant Lamar H. Knight of the constitutional requirements of substantive and procedural due process of law and total divestiture of the constitutional, fundamental right to earn a living through the *clear* absence of *in rem* or *in personam* jurisdiction of the subject matter, Style Crest Southeast Co., Inc., a Georgia corporation, which was transferred under the sham of color of state law" (R.-359) is the federal question herein involved and such federal question will never be frivolous, meritless, vexatious, or baseless.

> "No person shall be deprived of life, liberty or property except by due process of law." *Constitution of Georgia of 1945*, §2-103 (6359).
>
> "Protection to person and property is the paramount duty of government, and shall be impartial and complete." *Constitution of Georgia of 1945*, §2-102 (6358).
>
> "I swear that I will administer justice without respect to person, and do equal rights

to the poor and the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as judge of the superior courts of this State, according to the best of my ability and understanding and agreeably to the laws and Constitution of this State, so help me God." *Ga. Code Ann.* 24-2605, The Oath of Judges (4835).

"All Government, of right, originates with the people, is founded upon their will only, and is instituted solely for the good of the whole. Public officers are trustees and servants of the people, and at all times amenable to them." *Constitution of Georgia of 1945*, Bill of Rights, §2-101 (6357).

The transfer of the Georgia corporation by order of the state court judge and the restraint of this Petitioner's right to earn a living under penalty of contempt and confinement in state jail must be carefully scrutinized by this Court, for it was the instrument of state authority which was brought to bear to effect the "property" and "liberty" rights violated.

Petitioner's claim alleged violations of the "property" and "liberty" interests guaranteed by the Fourteenth Amendment of the *U. S. Constitution* and 42 *U.S.C.* §1983; to wit, the fundamental right to earn a living secured by ownership of the business out of which the living was pursued. "The term, 'liberty', . . . extends to the full range of conduct which the individual is free to pursue, including the right to practice any of the common occupations of life." *Shaw v. Hospital*

Authority of Cobb County, 507 F.2d 625 (C.A. Ga. 1975). "The right to earn a living is a fundamental, natural, inherent and most sacred and valuable right of any citizen and cannot be violated without due process of law. A person's business or calling is 'property' within the meaning of the due process clause of the *U. S. Constitution*." See *DeBerry v. City of La Grange*, 62 Ga. App. 74, 8 S.E.2d 146 (1940), followed in *Garrison v. City of Cartersville*, 62 Ga. App. 85, 8 S.E.2d 154 (1940); *Hughes v. Reynolds*, 223 Ga. 727, 157 S.E.2d 746 (1967); and *Richardson v. Coker*, 188 Ga. 170, 3 S.E.2d 636 (1939).

THE FEDERAL STATUTE INVOLVED

"No court can create a jurisdiction for itself by its own statement of facts put on the record (or order of the court), without any proceedings as the basis of such record (or order of the court)." *Bradley v. Fisher*, 80 U.S. 335, at 357 (1871). "If the alleged trespasser be a judge of a court of record, the only question is: Was the act done a judicial act, within his jurisdiction? Of this he is not the judge. If it was not and he acted without jurisdiction he has ceased to be a judge." *Randall v. Brigham*, 74 U.S. 523, 19 L.Ed. 285 (1868).

"Willful abuse of power, corrupt exercise of office, express malice towards an individual and working intentional injury to him by means of false (unauthorized) entries made by a judge on the records of a court of general jurisdiction, are not judicial acts and are not

within the discretion of the judge; and satisfactory proof of those facts is admissible in evidence in actions to usurp the wrong done by such acts; to show that in a particular case the judge attempted to create for himself a jurisdiction and discretion not given by the law." *Bradley v. Fisher*, 80 U.S. 335, at 358 and cases cited therein (1871).

STATE OF GEORGIA

CARROLL SUPERIOR COURT

CARROLL COUNTY

Civil Action, File No. 6122

FRANCES WHITE TALLY
Plaintiff,

vs.

PLEASANT RICHARD TALLY
Defendant.

SUMMONS
Suit for Divorce, etc.

To the above-named Defendant: Pleasant Richard Tally

You are hereby summoned and required to file with the Clerk of said Court and serve upon Johnson & Beckham Plaintiff's attorneys, whose address is 201-4 Peoples Bank Building, Carrollton, Georgia 30117 an answer to the complaint which is herewith served upon you, within 30 days after

service of this summons, upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

* * *

IN THE
SUPERIOR COURT FOR THE
COUNTY OF CARROLL,
STATE OF GEORGIA

FRANCES WHITE TALLY

vs

PLEASANT RICHARD TALLY

Civil Action, File No. 6122

Suit for divorce, etc.

* * *

5.

The parties are the owners of real estate located at 1357 Cecilia Drive, S.E., according to the numbering of the City of Atlanta, together with a 1956 Ford, 1962 Ford Fairlane, 1959 Ford Galaxie, 1963 Econoline Ford, boat and motor, house trailer and contents, $1,000.00 worth of stock. Also, the defendant has money at Atlanta General Depot, No. 1 and No. (sic) Fort McPherson Credit Union, Citizens Bank and Trust Company, he has a checking account at the Bank of Fulton County in East

Point. Plaintiff asks that the defendant be enjoined and restrained from changing the status of, disposing of or encumbering any of the property listed above.

* * *

7.

Plaintiff asks the court to grant her a divorce from said defendant, together with temporary and permanent child support, temporary and permanent alimony, and a reasonable sum as attorney fees.

WHEREFORE, plaintiff demands:

a) that rule nisi issue directed to the defendant requiring him to show cause on a day certain why plaintiff should not be awarded temporary and permanent custody of said children, why he should not be required to pay temporary and permanent child support and alimony, attorney fees and why he should not be enjoined from disposing of, encumbering or changing the status of the property mentioned herein;

* * *

JOHNSON & BECKHAM
BY:
/s/ _____
William P. Johnson

201-4 Peoples Bank Bldg.
Carrollton, Georgia
30117

ATTORNEYS FOR PLAINTIFF

GEORGIA, CARROLL COUNTY

FRANCES WHITE TALLY

vs

PLEASANT RICHARD TALLY

CARROLL SUPERIOR COURT

The within and foregoing case coming on to be heard, and after hearing from the parties and their counsel,

IT IS HEREBY ORDERED, CONSIDERED and ADJUDGED that temporary possession and control of Stylecrest is hereby awarded to the plaintiff. The home on Cecilia Drive in Atlanta, Georgia, together with the housetrailer, is temporarily awarded to the husband, the defendant.

Further ORDERED that defendant shall pay to the plaintiff the sum of $120.00 per month as child support. Said payments to begin October 1, 1969, and to continue until further order of this court.

Further ORDERED that defendant shall pay to the plaintiff the sum of $125.00 as attorney fees, on or before October 15, 1969.

Further ORDERED that defendant shall have the right to visit with his children on the first and

third Sunday afternoons, from 1:00 P.M. until 7:00 P.M., until further order of this Court.

AND IT IS SO ORDERED, this 16th day of September, 1969.

/s/ Lamar H. Knight
JUDGE,
Carroll Superior Court

(R.-161 to 166).

The state court judge attempted to create for himself a jurisdiction over Style Crest Southeast Co., Inc. not given by law. Lamar H. Knight willfully abused the power and exercise of his office, usurping authority, working intentional, injury to Pleasant Richard Tally by means of false (unauthorized) entries on the records of a court of general jurisdiction. The order of Lamar H. Knight was not a judicial act within the statutory power of *Ga. Code Ann.* 30-203 and not within the discretion of the judge.

> "The Defendant, Judge Lamar H. Knight, under color of state authority, in a state proceeding for divorce, without subject matter jurisdiction of the corporation, Style Crest, or of all the shareholders thereof, and without notice or opportunity to be heard as to the respective civil rights of the Plaintiff in this action, Pleasant Richard Tally, as required by the substantive and procedural due process provisions of the *14th Amendment of the United States Constitution* and 42 *U.S.C.* §1983, did

> deliberately and unconstitutionally transfer possession and control of the entire interest in Style Crest to Frances White Tally, the plaintiff in the state proceeding for divorce." (R.-55) Count 5 of the Amended Complaint.

> "Every person, who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 *U.S.C.* §1983 (R.-53).

The term, "due process of law", includes all the steps essential to deprive a person of life, liberty, or property; it includes all the forms and acts essential to its application and to give effect to it. The means that may be employed to accomplish the purpose of the law is the process; in other words, "process", is the mode by which the purpose of the law may be effected. The term, "law", as used in this guaranty embraces all legal and equitable rules defining human rights and duties between the state and its citizens. The term, "due process of law", as used in the Federal *Constitution* has been repeatedly declared to be the exact equivalent of the phrase "law of the land", as used in the *Magna Carta*. 16 *Am Jur 2d* 546, 547.

If statutory power had existed,

> "In order for the Defendant, Judge Lamar H. Knight, to have had proper subject matter jurisdiction over Style Crest Southeast Co., Inc., on September 16, 1969, one of two legally necessary acts would have had to have occurred: (a) process would have had to have issued from the Superior Court of Carroll County attaching some personal or real property asset of Style Crest, or (b) the Defendant, Lamar H. Knight, would have had to have had all shareholders of the corporation before the court by means of personal service of process on all such shareholders. (R.-145).

The guaranty of due process of law required Defendant Judge Lamar H. Knight to observe the *Constitution* and laws of the State of Georgia applicable to all Georgia citizens.

> "No process whatsoever issued at any time against either the assets of Style Crest, or against all the shareholders. Thus, the Defendant, Lamar H. Knight did not have *in rem* jurisdiction of Style Crest on September 16, 1969, and further, said Defendant did not have *in personam* jurisdiction over all the shareholders, as Defendant, Homer Williams, who owned 900 shares of stock in Style Crest Southeast Co., Inc., was never personally served with process or made a party to the suit for divorce instituted by Frances White Tally against Pleasant Richard Tally." (R.-145).

Procedural due process may be defined as the aspect of due process which relates to the requisite characteristics of proceedings looking toward a deprivation of life, liberty, or property; procedural due process makes it necessary that one whom it is sought to deprive of such a right must be given notice of the fact that the state court will adjudicate his rights in a Georgia corporation in the notice of the proceedings; he must be given an opportunity to defend himself on those rights in the Georgia corporation; and the problem of the propriety of the deprivation, under the circumstances presented, must be resolved in a manner consistent with essential fairness. Judgment without such notice or citation in the petition for divorce, without opportunity to defend, without statutory authority, without *in rem* or *in personam* jurisdiction lacks all the attributes of a judicial determination. It is usurpation and oppression and can never be upheld where justice is fairly administered. 16 *Am Jur 2d.* 548.

> "Shall it be said that a citizen may be wrongfully deprived of his life, liberty, and property in his own country and the national arm cannot be extended to him . . . whose duty it is to afford him redress, but refuses or neglects to discharge such duty? Such theory may be palpable to the minds of men who have been too much educated in the technicalities which make the remedy depend upon the form of action, but it must be impalpable logic, indeed, to those whose lives, liberties, and properties are all at the (state authorities') mercy."

Legislative History of the Civil Rights Acts of 1871, *The Congressional Globe*, March 31, 1871, p. 368, Mr. Sheldon.

Yet, the District Court refused or neglected to discharge its duty when it dismissed the amended complaint.

The constitutional question pleaded by this Petitioner both in the amended complaint and the answers to the motions to dismiss reaches beyond the answer rendered by the District Court in dismissing the claim for relief as follows:

> ". . . it is clear that Judge Knight had jurisdiction over the divorce proceedings in question and was empowered to make a disposition of plaintiff's share holdings in Style Crest under *Ga. Code Ann.* Section 30-203. Defendant Knight is therefore immune to suit under Section 1983."

The fallacies underlying this reasoning by the District Court are the issues on appeal by petition.

> "The Superior Courts shall have exclusive jurisdiction in cases of divorce . . ." *Constitution of Georgia of 1945*, Section 2-3901.

> "The General Assembly must have considered that the word 'jurisdiction' as employed in Section 5856 and 5859, related only to subject matter and matters of practice for the act simply quotes the language of the

> *Constitution* prescribing the kinds of cases over which the justices shall have jurisdiction . . . ." *Starnes v. Mutual Loan and Banking Co.*, 102 Ga. 597 at 601, 29 S.E. 452, 454 (1897).

If the basis of the District Court's dismissal of petitioner's amended complaint was that the Defendant Lamar H. Knight had "jurisdiction" in the state proceeding for divorce, then the issue, according to the General Assembly of Georgia and the Georgia Supreme Court in *Starnes, supra*, is:

> Were the transfer of possession and control of a Georgia corporation and the restraint of the natural, inherent, most sacred and valuable right (of all Georgia citizens); that is, the fundamental right to earn a living *proper subject matter* for a divorce proceeding? See *Bradley v. Fisher*, 80 U.S. 335 (1871).

Under the tests of *Bradley* and *Starnes*, the only answer and petitioner's answer is NO! This will be more clearly demonstrated in answer to Question 8.

And with the answer being NO, then:

> "IT IS HEREBY ORDERED, CONSIDERED AND ADJUDGED THAT temporary possession and control of Stylecrest is hereby awarded to the plaintiff (Frances White Tally)."

was a "false (unauthorized) entry made by a judge on the records of a court of general jurisdiction" *Bradley*

v. Fisher, supra. And the restraint of the "natural, inherent, most sacred and valuable right to earn a living" was *in the clear absence of due process*, for:

> "No person shall be deprived of life, liberty or property except by due process of law." *Constitution of Georgia of 1945*, §2-103 (6359).

THE COMMON LAW DOCTRINE

It is the general rule that where a judge has jurisdiction he is not liable in a civil action under 42 *U.S.C.* 1983 for his acts done in the exercise of his judicial function. The underlying reason for this rule of immunity is not the judicial character of the officer but the judicial character of the act. The privilege of immunity applies to judges of courts of superior or general jurisdiction for acts performed wholly within their jurisdiction or even for acts performed in excess of their jurisdiction. However, the non-existence of jurisdiction does not entitle the state court judge to the privilege of immunity regardless of the individual judge's good or bad motivation. Without jurisdiction, more often termed "in the clear absence of jurisdiction", the acts are non-judicial in nature and no privilege insulates the usurper from liability under 42 *U.S.C.* 1983. A more complete treatment of the common law doctrine, derived from the practice in England upon which American jurisprudence is based, appears in 46 *Am Jur 2d* § 72 through § 83.

Legal scholars have criticized the rationale behind the privilege of immunity granted to state court judges, as well as this Court's rationale behind the

landmark case of *Pierson v. Ray*, 386 U.S. 547 (1967), a case brought to this Court from the same U.S. Circuit as the petition now at bar. Whether the criticisms are justified or not is *not* in issue in this petition. Whether *Pierson v. Ray, supra*, was rightly or wrongly decided by this Court is *not* in issue here. Pleasant Richard Tally's contention in this petition, consistent with every pleading that has gone before by him, is that *Pierson v. Ray, supra*, was not then and is not now on point with the unique factual situation of first impression pleaded in the U.S. District Court and the Court of Appeals for the Fifth Circuit. *Pleasant Richard Tally v. William P. Johnson, et. al., is* the equivalent of the hypothetical example of Justice Fields in *Bradley v. Fisher*, 80 U.S. (13 Wall) 335 (1871)! The injustice from which the petitioner now appeals to this Court is violation of *Conley v. Gibson*, 355 U.S. 41 (1957); *Cook & Nichol, Inc. v. Plimsoll Club*, 451 F.2d 505 (5th Cir. 1971); and Rule 12(b)(6) of the Federal Rules of Civil Procedure. Petitioner has no problems with the state of the law as annotated in 46 *Am Jur 2d* § 72 through § 83. Petitioner has every reason to complain that there are no circumstances left open in the Fifth U.S. Circuit where judicial immunity does not apply.

NATIONAL SIGNIFICANCE OF *PLEASANT RICHARD TALLY v. WILLIAM P. JOHNSON, ET AL.*

Since the dismissal under Rule 12(b)(6) on the "bare bones pleadings" by the U.S. District Court for the Northern District of Georgia, affirmed without opinion by the Fifth U.S. Circuit Court of Appeals, is in conflict with case law decisions in the Fifth, Sixth and now with the opinion of the Seventh U.S. Circuit in

Stump v. Sparkman, No. 76-1750 presently before this Court, the impact of granting or denying the petition now before this Court goes far beyond a simple conflict of U.S. Circuits on the issue of common law judicial immunity and civil rights actions brought under 42 *U.S.C.* 1983. The pleadings present a *unique* federal question of first impression *because herein is the hypothetical example of Justice Fields* in *Bradley v. Fisher*, 80 U.S. 335, at 357, 20 L.Ed. 646 (1871). The elements of *Wade v. Bethesda Hospital*, 356 F.Supp. 380 (S.D. Ohio 1973) are here; that is, no express grant of statutory authority. The elements of *Stump v. Sparkman* are here; that is, no judicial proceeding was then pending before the state court judge involving transfer of a Georgia corporation or the abortion of the "natural, inherent, most sacred and most valuable right of all Georgia citizens" — the fundamental right to earn a living. But the factual setting of this deprivation of the "property" and "liberty" interests redressable under the federal statute goes clearly beyond either of the two decisions now under consideration by this Court, *Wade* or *Stump*. Pleasant Richard Tally submits that not until this factual situation is under consideration as well will this Court have the area illuminated so that an enlightened principle may be handed down.

When this Court considers the constitutional absurdity now the law of this case and the law in the Fifth Circuit, clearly demonstrated by the Henry Ford example contained herein, Pleasant Richard Tally, businessman, salesman and furniture manufacturer until the incredible sham of state action by a state court judge, suggests its fullest impact will be felt upon this Court by stepping into the shoes of Mr. Ford

and then asking yourselves: Would you work twenty years only to have this happen to you? The business community as well as the legal profession know that the time and opportunity are ripe for a definitive answer.

REASONS FOR GRANTING THE WRIT

Petitioner posits the following to Questions 1 and 5.

Under *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), the proper elements for the formula of determining a non-judicial act under *Bradley v. Fisher*, 80 U.S. 335 (1871), are to be determined from three questions:

1.) Under the Georgia corporations statutes, do Superior Court judges have any jurisdiction and authority?

2.) Is the type of order issued by the Appellee judge in a suit limited to divorce, enjoining the right to earn a living, within the general power of the Superior Court judge under decisions of the State of Georgia?

3.) Has the Georgia temporary alimony statute been construed so that the husband's title to a Georgia corporation may be divested by a Superior Court judge?

The first question was answered by Petitioner in his Brief on Appeal as follows:

Lamar H. Knight usurped the corporate powers granted under Georgia law with the issuance of its charter to Style Crest Southeast Co., Inc., when he restrained and enjoined the Vice-President and Chairman of the Board, the producer of over 90% of the corporate accounts, from his fundamental right to earn a living.

Ga. Code Ann. 22-712, Removal of Officers, states:

> (b) An officer or agent elected by the shareholders may be removed *only* (emphasis added) by vote of the shareholders, unless the shareholders shall have authorized the board to remove such officer or agent but the authority of such officer or agent to act for the corporation may be suspended by the *board* for cause.

No meeting of the shareholders, no shareholder action, no meeting of the board of directors, no board of directions action *ever* took place. Counsels for Petitioner find no statutory power in the corporation statutes of Georgia to authorize the order or restraint of Pleasant Richard Tally. See 1 Hornstein, *Corporation Law and Practice* §179 (1959) for the former Georgia law; to wit, an officer could be removed by the board of directors with or without cause, although the officer might recover damages where such removal entailed breach of an enforceable employment contract.

In 1912, the *Constitution of Georgia* was amended to provide that the General Assembly "may confer" power on the Superior Court *vis-a-vis* Georgia corporations; that is, the power to grant charters to manufacturing companies. This power; however, "shall be" exercised in a manner which the legislature "shall prescribe by law". See *Free Gift Society No. 25 v. Edwards*, 163 Ga. 857 at 864, 137 S.E. 382 (1927); the Superior Court's power to grant charters is *not* judicial, but legislative. See *Creswill v. Knights of Pythias*, 133 Ga. 837 at 847, 67 S.E. 188 (1910); *White v. Davis*, 134 Ga. 274 at 280, 67 S.E. 716 (1910); *In re Union Club*, 142 Ga. 261, 82 S.E. 643 (1914). Code §24-2615 (4849, 791 P.C.) Powers and Jurisdiction of Superior Courts:

> The superior courts have authority:
>
> (6) To exercise such other powers, not contrary to the *Constitution*, as are or may be given to such courts of law. (Act 1799, Cobb, 1135, Acts 1868, p. 131).

Even the equity powers of the superior court could not have sanctioned the disposition of Style Crest because equity follows the law. Equity takes jurisdiction of matters germane to the subject matter only. Transfer of Style Crest was not germane. *Toler v. Goodwin*, 74 Ga.App. 468, 40 S.E.2d 214 (1946). "We are of the opinion that in the absence of express statutory authority, a court of equity has no power to dissolve a corporation, appoint a receiver to administer its assets, wind up the affairs of the corporation, *or distribute its assets among its shareholders*" (emphasis added). Supreme Court of Georgia, *Gibson v. Thornton*, 107 Ga. 545 at 562, 564 (1899). See also, *In re Electric Supply Co.*, 175 F. 612 (D.C. Ga. 1909); *Daniel v. Jones*, 146 Ga. 583, 91 S.E. 665 (1917); *Richter v. Richter*, 202 Ga. 554, 43 S.E.2d 635 (1947).

> "A private corporation is a contract between the government and the corporators; and the Legislature cannot repeal, impair or alter the rights and privileges conferred by the charter, against the consent and without the default of the corporation, judicially ascertained and declared *in a proceeding instituted by the government, directly for that purpose.*" *Young v. Harrison*, 6 Ga. 130, (1849).

The limited and circumscribed power of the Superior Court to act upon private corporations such as Style Crest Southeast Co., Inc. is given in *Ga. Code Ann.* Sections 22-1315 and following, especially §22-1317 which provides that in *an action by a shareholder* to liquidate the assets and business of a corporation (a) when the directors are deadlocked in management of the corporate affairs, (b) acts of the directors are illegal or fraudulent, or (c) shareholders are deadlocked in voting power; or *by a creditor* (a) when his judgment unsatisfied must be realized by liquidating the corporation's assets or (b) the creditor's claim is established versus an insolvent corporation, the Superior Court has powers. The only other statutory grant of power to the Superior Court is found in §22-1316 in actions brought by the Attorney General of Georgia for involuntary dissolution of a Georgia corporation upon certification to the Attorney General by the Secretary of State that dissolution should be sought. However in each instance, the statutory grant of power conferred by the General Assembly begins:

> "In proceedings to liquidate the assets and business of a corporation . . .". See §22-1322 as an example.

Petitioner maintains such statutory grant of power as "may be conferred by the General Assembly" does not state: "*In proceedings for divorce*". It should be noted how specific the grant of authority by the General Assembly is:

> §22-1316:
>
> Every action for involuntary dissolution of a corporation shall be commenced in the name of the State by the Attorney General . . . . Process shall issue and be served as in other civil actions.

As pleaded, no process ever issued against Style Crest because no proceeding was then pending to justify process, justify transfer of the corporation to one shareholder, or justify restraint of the corporation's Vice-President and Chairman of the Board.

> "If there is no remedy for this, if the rights of citizenship may be denied without redress, if the *Constitution* may not be enforced, if life and liberty may not be effectively protected, then; indeed, is our civil Government a failure, and instead of enjoying liberty regulated by law, its subjects may live only by the sufferance of lawless and exasperated conspirators. The cardinal doctrine of our institutions is that all citizens are equal before the law, and that the law shall equally secure to all their natural and inalienable rights. It is for the purpose of practically enforcing these cardinal principles that this bill is proposed."

Legislative History of the Civil Rights Act, *The Congressional Globe*, April 1, 1871, Mr. Lowe, p. 368.

The second question was answered by the Supreme Court of Georgia in *Coweta Bonding Company v. Carter*, 230 Ga. 585 (1973) and *In re Prisoners Awaiting Transfer*, 236 Ga. 516 (1976). The Supreme Court of Georgia in 1973 held that prohibiting the fundamental right to earn a living without statutory authority denied due process of law. In *Coweta Bonding Company v. Carter*, 230 Ga. 585, 198 S.E.2d 281 (1973), the *order* of the trial judge in denial of a motion to set aside the forfeiture of a criminal appeal bond attempted to enjoin the fundamental right to earn a living as follows:

> "W. W. Craven and the Coweta Bonding Company are prohibited from writing bonds in Coweta County and within the Coweta Judicial Circuit."

The Supreme Court of Georgia stated that the fundamental right to earn a living, the writing of appeal bonds, was not an issue in the forfeiture proceedings. The trial record in that case showed that neither W. W. Craven nor the Coweta Bonding Company was given notice that any action was pending in this regard (nor that they were afforded a hearing on their right to earn a living). "We here found no authority which sustains the trial court's injunction here without due process nor has any been cited. . . . We hold that the trial court erred in prohibiting W. W. Craven and the Coweta Bonding Company from writing bonds in Coweta County within the Coweta Judicial Circuit. Code §24-2616(4)." 230 Ga., 585 at 589. As pleaded by Petitioner,

the Supreme Court of Georgia views the type of *order* issued by Lamar H. Knight as "without jurisdiction". No supervisory power was given the Superior Court over the Georgia corporation, Style Crest. *No action was then pending in the Superior Court of the Coweta Judicial Circuit against Style Crest.* No notice or opportunity to be heard was afforded. The Order was entered by the judge on his own motion. "The order was completely void", in the opinion of the Supreme Court of Georgia in comparing the order of Lamar H. Knight to the order of the Superior Court of Colquitt County in *In re Prisoners Awaiting Transfer*, 236 Ga. 516 (1976). See also, *Wade v. Bethesda Hospital*, 356 F.Supp. 380 (1973).

In *Osbekoff v. Mallory*, 188 N.W. 2d 294 (Iowa 1971), annotated in 64 *ALR 3d.* 1242, the Supreme Court of Iowa *found* no matter pending in the mayor's court involving the plaintiff's property rights in his automobile and no process had been issued by the mayor's court justifying seizure of the automobile by the court. The Supreme Court of Iowa held that the magistrate of the mayor's court was not judicially immune to suit.

Like, the magistrate in *Osbekoff, supra*, Lamar H. Knight is not judicially immune to suit.

The third question was decided by the Supreme Court of Georgia in *Lloyd v. Lloyd*, 183 Ga. 751 (1937), wherein, the state high court laid down the rule for alimony, in harmony with the prevailing doctrine in this country. *Ga. Code Ann.* 30-203 reads *in toto:*

> "In arriving at the provision, the judge shall consider the peculiar necessities of the wife

> growing out of the pending litigation; also any evidence of a separate estate owned by the wife; and if such estate is ample, as compared with the husband's temporary alimony may be refused."

The District Court found the *Ga. Code Ann.* 30-203 "empowered Judge Knight to make a disposition of Plaintiff's share holdings in Style Crest".

Alimony is the allowance which a husband may be compelled to pay out of his estate to his wife, ordinarily in money, periodically or in gross, for her maintenance when she is living apart from him. Every provision in a decree of separation made solely for the purpose of support for the wife is to be regarded as alimony, whether expressly designated or not. 17 *Am Jur* 405, Divorce and Separation §496. The inherent, incidental, or express power of the court to decree alimony in a divorce action does not empower the court to set apart to the wife as alimony any specific property of the husband. *Bray v. Landergren*, 161 Va. 699, 172 S.E. 252 (1934). In *Lloyd v. Lloyd*, 183 Ga. 751, 189 S.E. 903 (1937), the Supreme Court of Georgia laid down the rule for alimony stating that the meaning of the word is restricted to money, and unless expressly authorized by statute, no award can be made out of property of the husband, divesting him of title to the same, quoting 19 *Corpus Juris* 262, §610. The Supreme Court of Georgia further stated:

> "The amount given to the wife in a decree of divorce is generally called 'alimony'. This term is derived from the Latin meaning

> basically to nourish; that is, to supply the necessities of life. It was introduced into divorce proceedings by the early ecclesiastical courts of England and in early practice of the courts it was defined to be 'that support which the husband, on separation, is bound to provide for the wife, and is measured by the wants of the wife and the circumstances and ability of the husband to pay'."

> "Temporary alimony or alimony *pendente lite* is a common law right."

> " 'Alimony' is a technical word, theoretically restricted to personalty, and practically to money. It is payable out of the husband's estate, real as well as personal. *But the word never covers the estate itself.*"

> "It will be seen from what has been said that our Code definition of alimony adds little, if anything, to the meaning of or the right to alimony as recognized under the common law." p. 904.

The Supreme Court of Georgia in *Lloyd v. Lloyd*, cited above, concluded that in a proper case, and in the sound discretion of the state court judge, the Superior Court may award the *use* of the husband's property, such as the use of the home or household goods, but no award of temporary alimony may be made to *totally* divest the husband of title.

Petitioner posits the following to Question 2.

Respondents' legal arguments were grounded upon cases totally distinguished on their facts by the Petitioner in response to the Motion to Dismiss filed by Lamar H. Knight. The case on appeal is not the fact situation found by the courts in *Pierson v. Ray*, 386 U.S. 547 (1967); *Williams v. Sepe*, 487 F.2d 913 (1973); or *Guedry v. Ford*, 431 F.2d 660 (1970). Nor did the Petitioner ever intend to plead or infer those distinguishable fact situations. The central document presented by the Petitioner, the Petition for Divorce with the Order of the Court signed by Lamar H. Knight are proof that Petitioner's case is distinguishable.

A.

In *Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967), the plaintiffs were arrested by municipal police officers on charges of violating a state breach-of-peace statute while attempting to use the segregated facilities of an interstate bus terminal. They were convicted on the charges when brought before a municipal police justice. On appeal to the County Court, one plaintiff was acquitted; the charges against the others were dropped. In an action in U. S. District Court under 42 *U.S.C.* Section 1983, the plaintiffs sought money damages against the municipal police justice and the police officers. The jury returned a verdict for the defendants and the plaintiffs appealed. The Court of Appeals for the Fifth Circuit held that the judge was immune under 42 *U.S.C.* Section 1983. The U. S. Supreme Court, in reviewing the record below, stated:

> "The record is barren of any proof or specific allegation that Judge Spencer played any role in these arrests and convictions other than to adjudge petitioners guilty when their cases came before his court."

The *key* concepts here are (1) *in personam* jurisdiction (by arrest) of the parties before the court existed; and (2) the disposition of the matter at hand; namely, the adjudication of the guilt or innocence of the parties could be properly upheld because the proceeding was one for breach of the peace. The "due process" requirements of notice and opportunity to be heard were fulfilled. Relating these concepts to the case before this Court, we find (1) a lack of *in personam* or *in rem* jurisdiction of the corporation, Style Crest, before Judge Knight's court; and (2) the disposition of the matter at hand; namely, the transfer of possession and control of the Georgia corporation could not properly be maintained because the proceeding was not one for a declaration of respective rights in the corporation, but one for divorce between parties who did not represent the entire interests in the corporation. The "due process" requirement of notice and opportunity to be heard by all interest holders was not fulfilled.

Pierson v. Ray, supra, does not deal with a specific allegation that subject matter jurisdiction was lacking before the municipal police justice. *Pleasant Richard Tally v. William P. Johnson, et. al.* does specifically allege lack of subject matter jurisdiction. The deprivation of this Plaintiff's civil rights was proximately caused by this null and void disposition of the corporate entity, Style Crest Southeast Co., Inc.

In *Williams v. Sepe*, 487 F.2d 913 (5th Cir. 1973), plaintiff brought a civil rights action against a judge who attempted to investigate a report that the plaintiff had misrepresented himself as the judge's law clerk without giving the plaintiff written notice of the criminal contempt charge as required by the Florida Code of criminal procedure. The court held that "the defects in the procedure *employed* (emphasis our own) will not support a conclusion that there was a clear absence of all jurisdiction". The reason this conclusion is sound is because the plaintiff in *Williams v. Sepe* was personally before Judge Sepe and procedural irregularities do not rise to the standard of clear absence when irregular *in personam* jurisdiction exists. Plaintiff maintains that he has alleged a lack of all jurisdiction, a failure of any procedure being employed, in regard to Style Crest by the Defendant, Lamar H. Knight.

In *Guedry v. Ford*, 431 F.2d 660 (5th Cir. 1970), plaintiff filed a civil rights action against a District Attorney and a city court judge who had charged, tried, convicted and sentenced him unfairly on a charge of making harassing telephone calls. The gist of the suit by the plaintiff was a charge of conspiracy to deprive civil rights. The court held that "[T]he subject matter of the charges against the plaintiff, Allen T. Guedry, Jr., fall within the jurisdiction and purview of the City Court of Hammon (presided over by the defendant judge, Ford)". *In personam* jurisdiction of Guedry existed before Judge Ford and Guedry was tried on a charge spelled out in the indictment, affording notice and opportunity to defend. Based upon the court's finding that the only complaint of the plaintiff in *Guedry* was that he did not get a fair trial, the civil rights action was dismissed. Again, this case is not on point with the case pleaded by this Petitioner. The corporation, Style Crest, was not sued or indicted, tried or convicted. Neither party attempted to divorce the corporation, but divorce each other.

In *Cross v. Byrum*, 348 F.Supp. 196 (1972), the District Court for the Southern District of Florida refused to grant a motion to dismiss by a defendant justice of the peace who, relying on judicial immunity proffered to the court that *Guedry v. Ford, supra*, required dismissal. The enlightened Florida judge realized, under *Conley v. Gibson*, 355 U.S. 41 (1957), that some factual situation might be proven where the facts in *Guedry* might not be on point and correctly declined to dismiss on the "bare bones pleadings", since to do so had a high mortality rate and violates the most fundamental rule of federal practice as enunciated in *Cook & Nichols, Inc. v. Plimsoll Club, supra*.

The simple fact distinguishing *Pierson v. Ray*, *Williams v. Sepe*, *Guedry v. Ford*, *Hill v. McClellan*, and *Dotlich v. Kane*, the latter two cases distinguished on their facts at (R.-181, 182, 183 and 186), is that before the state court judge, making the order of the court statutorily valid, were the only two parties necessary by *in personam* jurisdiction through process required for the disposition of the subject matter of the order.

In *Osbekoff v. Mallory*, 188 N.W.2d 294 (Iowa 1971), annotated in 64 *ALR 3d* 1242, a town mayor, acting as a

magistrate of a mayor's court, was held not immune from liability for abuse of process to collect a civil debt and by delivering the plaintiff's automobile to the dealer-creditor without plaintiff's consent. The Court reversing judgment of dismissal of the action in the lower court as barred by the doctrine of judicial immunity noted that the plaintiff had not voluntarily submitted himself to the jurisdiction of the mayor's court to deal with his property. The Court stated that his mere presence in the mayor's court in answer to the criminal charge against him had not given the mayor, acting as a magistrate, jurisdiction in any proceeding to hear and determine the plaintiff's rights in his automobile, since no matter had been pending in the mayor's court involving the plaintiff's property rights in the automobile and no process had been issued by the mayor's court justifying seizure of the automobile by the court. The Court in discussing the doctrine of judicial immunity stated that it extended to courts of limited jurisdiction and further stated that when a magistrate acts wholly without jurisdiction, civil liability attached for his malicious abuse of state process under the pretense of acting in his official capacity. Thus, the Court concluded that the lower court erred in dismissing the action for it appeared that the plaintiff had not failed to state a claim for relief under any set of facts which could be proven.

The facts are on point. Pleasant Richard Tally had not voluntarily submitted himself to the jurisdiction of Judge Knight's court to deal with his shareholder interest in Style Crest or his right to earn a living secured by this ownership. His mere presence before Judge Knight did not cure the pretense of authority to

act. No matter involving Style Crest was then pending and no process issued against Style Crest. Yet Defendant Lamar H. Knight signed over possession and control of Style Crest, for which action alone he is amenable to suit in this Court under 42 *U.S.C.* Section 1983 because he deprived this Petitioner of the right to earn a living.

B.

The distinction between "in excess of jurisdiction", *Pierson v. Ray, supra*, and "in the clear absence of jurisdiction", *Pleasant Richard Tally v. William P. Johnson, et. al.* may be demonstrated by the following examples using the order of Lamar H. Knight (R.-166).

It is hereby ordered, considered, and adjudged that:

1) Pleasant Richard Tally sell his shares of stock in Style Crest and pay the money therefrom to Frances White Tally as alimony —

this is clearly within his jurisdiction and authorized by *Ga. Code Ann.* 30-203.

2) Pleasant Richard Tally transfer the voting rights to his shares of stock in Style Crest to Frances White Tally —

this is clearly within his jurisdiction since *use* of the husband's property, without total divestiture of title is not in violation of *Lloyd v. Lloyd, supra*.

3) Pleasant Richard Tally's shares of stock in Style Crest are transferred to Frances White Tally —

this is clearly in excess of jurisdiction since *Ga. Code Ann.* 30-203, as interpreted by the Supreme Court of Georgia in *Lloyd v. Lloyd*, would not authorize the total divestiture of title to the husband's property.

4) That temporary possession and control of Style Crest is hereby awarded to Frances White Tally —

this is clearly in the absence of subject matter jurisdiction since *Ga. Code Ann.* 30-203, 22-1315, 22-1316, 22-1317 and following would not authorize the transfer; and *in personam* jurisdiction and *in rem* jurisdiction were clearly non-existent because the corporation was a *necessary party*.

Petitioner is entitled to treat all the allegations of the claim for relief and inferences therefrom as facts which could have been proven upon trial of the matter and introduction of competent evidence had not the Petitioner been precluded from such opportunity by

the District Court in error. With this in mind, counsels for Petitioner will now demonstrate why, if the above distinctions between "in excess of jurisdiction" and "in the clear absence of jurisdiction" were not legally true, the following absurdity would be constitutionally possible and a logical extension of the order of Lamar H. Knight:

Let us suppose that Henry Ford, III, who owned 1,000 shares of Ford Motor Co., now a Georgia corporation, were sued by his spouse, who owned 1,000 shares of Ford Motor Co. in Superior Court for the Coweta Judicial District. Both parties are residents of Georgia, living in Temple, Ga., and served with process. Would the Superior Court of Georgia have jurisdictional power to order the transfer of possession and control of Ford Motor Co. to the spouse? What of the shareholder interests of the millions of Ford Motor Co. stockholders who were not represented in the divorce litigation? Further, would the Superior Court of Georgia be able to order such transfer and effectuate such transfer by verbal restraint (injunction) to the effect that if Henry Ford, III, went back to his office on Monday morning and attempted to function as Chairman of the Board of Ford Motor Co., Henry would risk being thrown in jail in Carrollton for attempting to earn a living?

Such a result is "monstrous". *Gregoire v. Biddle*, 177 F.2d 579 at 581 (1949).

Petitioner posits the following to Question 3.

If the U.S. District Court for the Northern District of Georgia's reading of the dictum to the case at bar in

Pierson v. Ray, supra, required an appeal by this plaintiff to the Supreme Court of Georgia, which legal reasoning was affirmed without opinion by the panel, why, then, didn't U.S. District Judge Atkins, in the Southern District of Florida, within the Fifth U.S. Circuit, dismiss the 42 *U.S.C.* section 1983 civil action against two justices of the peace in *Cross v. Byrum,* 348 F. Supp. 196 (1972)? "This appears to leave open the possibility of some circumstances where immunity would not apply." p. 198, J. Atkins. Indeed, posits the Petitioner, where a state court judge, sitting in a domestic relations suit, with no statutory powers over Georgia corporations, with no jurisdiction by civil process attaching to the Georgia corporation, and his "want of authority being necessarily known to the judge" (Mr. Justice Field, *Bradley v. Fisher, supra,*) orders disposition of *Stylecrest,* not husband's or Pleasant Richard Tally's share holdings in Style Crest Southeast Co., Inc., the Georgia corporation, but *Style Crest.* Doesn't the Petitioner merit the holding of *Conley v. Gibson,* 355 U.S. 41 (1957)?

The amended complaint sought to answer the question: What is meant by the term *subject matter?*

> "Thus, if a probate court invested only with authority over wills and the settlement of estates of deceased persons, should proceed to try parties for public offenses, jurisdiction over the subject of the offenses being entirely wanting in the court, and this being necessarily known to its judge, his commission would afford no protection to him in the exercise of usurped authority." *Bradley v. Fisher,* 80 U.S. 335, 20 L.Ed. 646 (1871)

The panel's decision to affirm the District Court's legal reasoning translates the standard enunciated in *Bradley v. Fisher, supra,* to the following application:

> Thus, if a probate court invested only with authority over wills and the settlement of estates of deceased persons, should transfer an entire corporation, jurisdiction over the subject of corporations being entirely wanting in court, and this being necessarily known to its judge, nevertheless, a panel of the Fifth Circuit will say that's alright because there exists a probate statute under which estates of deceased persons may be settled by admission of wills to probate.

Under the panel's application of *Bradley v. Fisher* to the facts of Petitioner's Amended Complaint, Pleasant Richard Tally should count himself lucky that Lamar H. Knight didn't order him taken out and shot, under authority that it was only a divorce suit and the temporary alimony statute covers anything done to the husband under the guise of divorce. If he had, the "life" interest protected by 42 *U.S.C.* 1983 would also have been infringed. But the Fifth Circuit wouldn't have noticed.

Under the substantive law of the State of Georgia, as mandated by *Erie R. Co. v. Tompkins, supra,* the proper formulation, according to the standard laid down in *Bradley v. Fisher, supra, should have been* by the panel as follows:

> "Thus if a domestic relations court, vested only with authority over divorces, should pro-

ceed to try a party's natural and inherent right to earn a living and transfer a state corporation, without due process of law, jurisdiction over the subject of the corporation being entirely wanting in the court, and this being necessarily known to its judge because no state statute exists conferring jurisdiction over the subject of the corporation — 'without jurisdiction' says the Supreme Court of Georgia — his commission would afford him no protection in the exercise of the usurped authority."

Petitioner posits the following to Question 4.

"The fundamental tenets of tort law have application in cases brought under 42 *U.S.C.* section 1983, and claims under that statute are to be viewed against the background of tort liability which makes a man responsible for the natural consequences of his acts." *Ingram v. Dunn*, 383 F.Supp. 1043 (D.C. Ga.), affirmed 514 F.2d 1070 (5th Cir. 1974). Petitioner has found no exception to that rule of law. The panel's decision is contrary to the purpose of extending immunity to state court judges for their natural consequences of their acts and the Fifth Circuit's holding, as affirmed in *Ingram v. Dunn, supra*, in regard to 42 *U.S.C.* section 1983 civil actions. By operation of *Conley v. Gibson, supra*, it is a *fact* that the Respondent Lamar H. Knight on September 16, 1969, in his own handwriting, transferred possession and control of an entire Georgia corporation and terminated by injunction, from the bench, the Petitioner's right to manufacture and sell early American furniture and wood items. As stated above, the panel's decision, affirmance without

opinion of the U.S. District court, has not afforded Petitioner the benefit of every possible inference of the amended complaint, under Rule 12(b)(6), as required by *Cook & Nichol, Inc. v. Plimsoll Club*, 451 F.2d 505 (5th Cir. 1971). Petitioner maintains that affirmance under such conditions is legal error.

And the panel's *sub silentio* overruling of the holding of *Ingram v. Dunn*, 383 F.Supp. 1043 (D.C. Ga.), affirmed 514 F.2d 1070 (5th Cir. 1974), conjures up in the Petitioner that perhaps the entire Fifth Circuit Court should re-read the amended complaint with the following in mind from Mr. Justice Douglas:

"There is more than meets the eye here. Employability is the greatest asset most people have. . . . discharge may be the badge that bars . . . other employment. The shadow of that discharge is cast over the area where private employment may be available. And . . . in many cases, the ultimate absolution never catches up with the stigma . . . ." (February 19, 1974, in *Murray v. GSA*).

Thirteen years of hard work by Appellant to build up the furniture manufacturing corporation, which sustained thirty-eight families in Temple, Ga., went up in smoke by order of Lamar H. Knight. That infamous order reeked more havoc in the eight years of deprivation which followed than the fire which burned the factory to the ground in 1958.

Petitioner posits the following to Questions 6 and 7.

By affirmance without opinion, under Local Rule 21, to the effect that "no error of law appears", the panel

adopted the following legal reasoning of the U.S. District Court:

> "plaintiff's remedy, assuming error on the part of Judge Knight, was an appeal of the order, not a civil rights action against the judge." (R.-345.)
>
> (Order of U.S. District Judge Moye, dated June 28, 1977.)

From a time whereof the memory of man runneth not to the contrary, it has been settled that a civil rights action in federal court under 42 *U.S.C.* §1983 has been held to be free of the requirement that state judicial or administrative remedies must first be exhausted. *Lane v. Wilson,* 307 U.S. 268, 59 S.Ct. 872, 83 L.Ed. 1281 (1939); *Monroe v. Pape,* 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961); *McNeese v. Board of Education,* 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622 (1963).

Aside from the well pleaded and fully documented factual impossibility of perfecting an appeal through the deliberate gross negligence and callous indifference of his attorney in the state action, the Defendant Aubrey W. Gilbert, Pleasant Richard Tally was not required to exhaust state remedies before institution of a civil rights action under 42 *U.S.C.* section 1983 and the panel is in legal error to believe this is the state of the constitutional law to date.

The U.S. District Court believed such was mandated by its reading of the dictum to the case at bar in *Pierson v. Ray, supra.* As discussed below, the facts in *Pierson* are not the facts of the amended complaint and

"the record is not barren of any proof or specific allegation" that Judge Knight merely decided that grounds for legal separation appeared and he so ordered. The *facts* found by the trier of fact in *Pierson v. Ray* were (1) that *in personam* jurisdiction (by arrest) of the parties before the court existed; and (2) the disposition of the matter at hand; namely the adjudication of the guilt or innocence of the parties was proper because the proceedings were for breach of the peace by the parties before the Court. In *Pleasant Richard Tally v. William P. Johnson, et. al.,* the facts of the amended complaint are (1) that *in personam* and *in rem* jurisdiction of the Georgia corporation, Style Crest, before Judge Knight was lacking because all the shareholders of the Georgia corporation, meaning Homer Williams, owning 900 shares, were not sued for divorce by the Defendant William P. Johnson (para. 1 Complaint and (2) the disposition of the matter at hand; namely a decree of legal separation in a domestic relations suit could not include the non-judicial act of transferring possession and control of an entire Georgia corporation owned by more parties than the husband and wife who alone were before Judge Knight's state court. And further, the order of a domestic relations court could not include the enjoining of the right to practice any of the common occupations of life, including the occupation of salesman and furniture manufacturer. Therefore, the U.S. Supreme Court's decision in *Pierson v. Ray, supra,* equates to the legal theory of "in excess of jurisdiction", enunciated in 46 *Am Jur 2d,* Judges, Sections 72-84, giving rise to judicial immunity for Judge Spencer, so that any dictum to the case at bar to the effect that the plaintiffs in *Pierson* would have to seek redress through a state appeal court was premised on

the trier of fact's finding the above jurisdictional elements present. However, dictum to the case at bar in a case standing for "in excess of jurisdiction", is of no significance in a federal civil rights action under 42 *U.S.C.* section 1983, when the legal theory, "in the clear absence of jurisdiction", is well pleaded factually. In such a case, the rule in *Monroe v. Pape*, 365 U.S. 167 (1961) applies:

> "It is no answer that the state has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."

Monroe v. Pape was decided in 1961; *Pierson v. Ray* was decided in 1967. If the decisions of the U.S. Supreme Court are mandated to all the Courts of Appeals, why would the Sixth U.S. Circuit Court of Appeals, sister circuit to the fifth, adopt *verbatim* the rule in *Monroe* over *Pierson* in a 42 *U.S.C.* section 1983 civil action decided in 1972? See *Lucarell v. McNair*, 453 F.2d 836 (6th Cir. 1972).

Under *Lucarell, supra*, Petitioner's remedy continues to remain a civil rights action against the judge. *Cross v. Byrum*, 348 F.Supp. 196 (S.D. Florida 1972); *Wade v. Bethesda Hospital*, 356 F.Supp. 380 (1973); *Azar v. Conley*, 456 F.2d 1382 (1972); *Lynch v. Johnson*, 420 F.2d 818 (1970).

> "The Federal Government cannot serve a writ of *mandamus* upon State Executives, or upon State Courts to compel them to observe and protect the rights, privileges, and immunities of citizens. Hence, this bill throws open the doors of the United States courts to those whose rights under the *Constitution* are denied or impaired."

Legislative History of the Civil Rights Acts, *The Congressional Globe*, April 1, 1871, Mr. Lowe, p. 376.

The Fifth Circuit and the District Court by dismissing the amended complaint which pleaded in the clear absence of jurisdiction have attempted to close the courthouse doors on Petitioner's rights. This Court should continue to see that those doors remain open and reverse the District Court for the Northern District of Georgia.

> "I see nothing in the provisions of this bill to alarm the innocent. The law is a terror only to evil-doers. It is in harmony with the fundamental law —".

Legislative History of the Civil Rights Acts, *The Congressional Globe*, April 1, 1871, Mr. Lowe, p. 376.

Petitioner posits the following to Question 8.

The amended complaint sought the answer to the question: What is meant by the term *subject matter*?

As stated above, Pleasant Richard Tally had not voluntarily submitted himself to the jurisdiction of Judge Knight's court to deal with his shareholder interest in Style Crest or his right to earn a living secured by this ownership. His mere presence before Judge Knight did not cure the pretense of authority to act. There was a total failure of any procedure being

employed; that is, civil process, to bring the Georgia corporation, Style Crest Southeast Co., Inc. before the state court as subject matter for its disposition by the state court judge. No matter involving Style Crest was then pending before the state court. *Osbekoff v. Mallory*, 188 N.W. 2d 294 (Iowa 1971), annotated at 64 *ALR 3d.* 1242. Yet Lamar H. Knight signed over possession and control of Style Crest in the Order decreeing legal separation. The law is a body of rules recognized and enforced in courthouses. The Order decreeing legal separation was enforceable by contempt. The Order transferring Style Crest *was* the law enforceable by Lamar H. Knight and he made that enforceability perfectly clear to the deprivation of the fundamental rights alleged violated.

In the clear absence of civil process issuing from a state court attaching the Georgia corporation, Style Crest, by *in personam* jurisdiction of all the corporate shareholders or by *in rem* jurisdiction of some corporate asset, the land, buildings, machinery, equipment, inventory, or personalty, the exercise of a supposed grant of authority to act contra *Lloyd v. Lloyd, supra*, that is; *Ga. Code Ann.* 30-203, the temporary alimony statute, *without the power;* that is, civil process, to act is a complete judicial nullity, a void act, a void disposition, and usurps powers granted the corporation by Georgia law and strips the state court judge of any common law immunity when the exercise of usurped authority divests the fundamental right to earn a living secured by ownership of the business out of which the living was pursued. The grant of authority to act is not the same as the exercise of such grant in the total absence of process to legitimately effect such grant and does not vest jurisdiction over the property ordered disposed of.

Yet the District Court so adjudged that such a result is constitutionally possible. Then what, asks the Petitioner, is the purpose of issuing any civil state court process to bring the *power to act* together with the grant of authority to act upon a person or his "property" rights?

CONCLUSION

Counsel for Respondent, Lamar H. Knight, states at p. 4 of his Appeal Brief:

> "Superior Judge Knight was acting within his jurisdiction ... in granting temporary alimony from plaintiff's (Appellant's) estate."

Forget for a moment that the Supreme Court of Georgia in *Lloyd v. Lloyd* prohibited what counsel proffers. Petitioner would like to ask counsel for Respondent Knight just how he perceives the Georgia corporation, Style Crest Southeast Co., Inc., owned by Pleasant Richard Tally, Frances White Tally and Homer Williams to have been solely part of the estate of Pleasant Richard Tally? The Georgia corporation just wasn't part of any of its shareholders' estates. No case, no statute, no Georgia constitutional provision has been cited by counsel for the Respondent which would authorize the transfer of possession and control of a Georgia corporation owned by more parties than the two parties before Lamar H. Knight in the state proceeding. Counsel for the Petitioner must conclude that no such precedent or grant of authority exists. And because none exists, *Wade v. Bethesda Hospital, supra*, is directly on point. Contrast counsel for

Respondent's last quoted statement that Judge Knight was "acting within his jurisdiction" with the following statement from page 6 of his Brief:

> "Judge Knight might have exceeded his jurisdiction in making an improper award of property under Georgia's Temporary Alimony statute."

Well, which is it? Within or exceeding? The answer is simply: *in the clear absence of any jurisdiction or authority*, and without due process as stated correctly on page 2 of the Brief of Respondent Lamar H. Knight:

> "Plaintiff alleges these actions violated his constitutional due process and property rights (R.-55). Plaintiff further alleges that Judge Knight did not have jurisdictional authority to transfer 'possession and control' of the corporation to the plaintiff's wife; and therefore, his action was 'null and void' and 'completely stripped the defendant, Judge Lamar H. Knight of any judicial immunity' (R-56)."

You cannot exceed jurisdiction, if jurisdiction never existed!

In *Wade v. Bethesda Hospital, supra*, the U.S. District Court could find no statute in Ohio authorizing the abortion forced on the female plaintiff. No statute in Georgia exists to authorize the "abortion" of Petitioner's fundamental right to earn a living, forced on Pleasant Richard Tally in the name of state action and under penalty of state imprisonment!

The female plaintiff in Ohio was found entitled to recover damages under 42 *U.S.C.* §1983; Pleasant Richard Tally is equally entitled to recover under 42 *U.S.C.* § 1983.

According to counsel for Respondent Lamar H. Knight: "Plaintiff mistakenly confuses the test of judicial immunity." "Thus, the issue in this case is whether the Superior Court had jurisdiction over the divorce action in which the alleged orders were entered . . . , not whether the Superior Court had jurisdiction over the corporation . . . which was allegedly transferred . . . nor whether the Superior Court properly restrained the plaintiff." See page 4 of the Brief of Lamar H. Knight. Petitioner responds that the following illustration, directly on all fours with the instant case, reveals *he* is not mistakenly confused:

> "Thus, if a probate court, invested only with authority over wills and the settlement of estates of deceased persons, should proceed to try parties for public offenses, jurisdiction over the subject of the offenses being entirely wanting in the court, and this being necessarily known to its judge, his commission would afford no protection to him in the exercise of the usurped authority." Opinion of Mr. Justice Field, *Bradley v. Fisher,* 13 Wall (U.S.) 335, 352, 20 L.Ed. 646 (1871).

The panel's decision to affirm the U.S. District Court without opinion translates the standard enunciated in *Bradley v. Fisher, supra*, to the following application:

> Thus, if a probate court invested only with authority over wills and the settlement of estates of deceased persons, should transfer an entire corporation, jurisdiction over the subject of corporations being entirely wanting in court, and this being necessarily known to its judge, nevertheless, a panel of the Fifth Circuit will say that's alright because there exists a probate statute under which estates of deceased persons may be settled by admission of wills to probate.

Under the substantive law of the State of Georgia, as mandated by *Erie R. Co. v. Tompkins, supra*, the proper formulation, according to the standard laid down in *Bradley v. Fisher, supra*, should have been by the panel as follows:

> "Thus if a domestic relations court, vested only with authority over divorces, should proceed to try a party's natural and inherent right to earn a living and transfer a state corporation, without due process of law, jurisdiction over the subject of the corporation being entirely wanting in the court, and this being necessarily known to its judge because no state statute exists conferring jurisdiction over the subject of the corporation — 'without jurisdiction' says the Supreme Court of Georgia — his commission would afford him no protection in the exercise of the usurped authority."

> "If the alleged trespasser be a judge of a court of record, the only question is: Was the

> act done a judicial act, within his jurisdiction? Of this he is not the judge. If it was not and he acted without jurisdiction he has ceased to be a judge." *Randall v. Brigham*, 74 U.S. 532, 19 L.Ed. 285 (1868).

Respectfully submitted,

_____

Richard A. Straser

_____

Carole Suzzanne Holman

Co-Counsels for
Appellant-Petitioner

_____

Bushrod Corbin Washington
Associate Counsel
for Petitioner

CERTIFICATE OF SERVICE

I, the undersigned counsel for Pleasant Richard Tally, do hereby certify that a copy of the foregoing Petition to the Supreme Court of the United States for Writ of Certiorari was mailed by first class mail to the counsels for the respective Respondents with proper postage affixed, this the ____ day of March, 1978.

_____

Richard A. Straser

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-2339
Summary Calendar*

PLEASANT RICHARD TALLY,
a/k/a Dick Tally,
Plaintiff-Appellant,

versus

WILLIAM P. JOHNSON, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Georgia

(December 8, 1977)

Before GOLDBERG, CLARK and FAY, Circuit Judges

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

---

* Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I

1 See NLRB v. Amalgamated Clothing Workers of America, 5 Cir. 1970, 430 F.2d 966.

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Office of the Clerk

January 6, 1978

TO ALL PARTIES LISTED BELOW:

NO. 77-2339 — Pleasant Richard Tally, etc.
versus
William P. Johnson, et al

Dear Counsel:

This is to advise that an order has this day been entered denying the petition for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
EDWARD W. WADSWORTH,
Clerk
/s/ R. ADELINE BARNES
Deputy Clerk

Mr. Richard A. Straser
Miss Carole S. Holman
Mr. Sam D. Price
Mr. J. Eugene Beckham, Jr.
Mr. David H. Tisinger
Mr. Thomas E. Greer
Mr. Charles L. Goodson
Mr. Don A. Langham

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

PLEASANT RICHARD TALLY a/k/a DICK TALLY

versus C.A. No. C77-359-A

WILLIAM P. JOHNSON, HOMER WILLIAMS, AUBREY W. GILBERT and LAMAR H. KNIGHT

JUDGMENT

This action came on for consideration before the Court, Honorable CHARLES A. MOYE, JR., United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered,

It is Ordered and Adjudged the plaintiff, PLEASANT RICHARD TALLY a/k/a DICK TALLY, take nothing, that the action be dismissed and that the defendants' WILLIAM P. JOHNSON, HOMER WILLIAMS, AUBREY W. GILBERT AND LAMAR H. KNIGHT, recover their costs of action.

Dated at Atlanta, Georgia, this 3rd day of June, 1977.

BEN H. CARTER
Clerk of Court

BY: /s/ DORIS WYNEM
Deputy Clerk

Filed and entered in
Clerk's Office
this 3rd day of June, 1977

ORDER

(Number and Title Omitted)

This is an action for violation of plaintiff's civil rights under 42 U.S.C. § 1983. The case is presently before the Court on the motions of defendants William P. Johnson, Aubrey W. Gilbert, and Lamar H. Knight to dismiss the complaint, on defendant Homer Williams's motion for summary judgment, on defendants Johnson and Gilbert's motion for change of venue, and on the plaintiff's motion for contempt as to defendant Williams.

Plaintiff Pleasant Richard Tally alleges that in 1969 he and his former wife, Frances W. Tally, each owned 1,000 shares of common stock of Style Crest Southeast Co., Inc. (Style Crest) shares, and that defendant Homer Williams owned 900 shares of said stock. Frances Tally filed for divorce in the Superior Court of Coweta County, Georgia, on August 31, 1969. On September 4, 1969, plaintiff was allegedly terminated from his job as salesman for Style Crest by defendant William P. Johnson, Frances Tally's attorney. In the divorce proceeding held on September 16, 1969, the defendant Superior Court judge, Lamar H. Knight, awarded plaintiff's interest in Style Crest to Frances Tally and ordered the plaintiff to refrain from entering the premises of the corporation. Plaintiff claims that all defendants conspired in the divorce proceeding to deprive him of the constitutional right to earn a living.

The Court finds that the motion to dismiss of defendants Knight, Gilbert, and Johnson must be granted. Despite plaintiff's claims to the contrary, it is clear that Judge Knight had jurisdiction over the divorce proceedings in question and was empowered to make a disposition of plaintiff's share holdings in Style Crest under Ga. Code Ann. § 30-203. Defendant Knight is therefore immune to suit under section 1983. *Pierson v. Ray*, 386 U.S. 547 (1967); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1871); *Williams v. Sepe*, 487 F.2d 913 (5th Cir. 1973).

Defendants Gilbert and Johnson acted as the attorneys for the respective parties in the Tally divorce action in 1969. Said defendants were thus participating in private state court litigation, were not acting under color of state law, and cannot be held liable un-

der 42 U.S.C. § 1983. *Hill v. McClellan*, 490 F.2d 859 (5th Cir. 1974). Plaintiff argues that the attorneys' immunity is derivative of the judge's and cannot be sustained where the judge acted outside of his jurisdiction. In view of the Court's finding that the judge acted within his jurisdiction, however, this claim is not meritorious. Accordingly, the motions to dismiss of defendants Knight, Johnson, and Gilbert are hereby GRANTED.

Defendant Homer Williams files a motion for summary judgment asking that plaintiff's complaint be dismissed for failure to state a claim upon which relief can be granted. The motion is hereby construed as a motion to dismiss. The motion is GRANTED. Defendant Williams is a private person, not alleged to have acted under color of state law, who purportedly conspired with defendants Knight, Johnson, and Gilbert to deprive plaintiff of his civil rights. A private person alleged to have conspired with persons entitled to immunity cannot be held to have acted under color of state law. *Hill v. McClellan*, 490 F.2d 859, 860 (5th Cir. 1974); *Guedry v. Ford*, 431 F.2d 660, 664 (5th Cir. 1970). Plaintiff therefore states no cause of action against Homer Williams.

In view of the disposition of the above motions, the motion for change of venue is moot. The plaintiff's motion for a finding that Homer Williams is in contempt of Court is DENIED. The Court finds on the basis of Mr. Williams's affidavit that he believed facts as represented by him in his first affidavit to be true.

The Court finds that plaintiff has failed to state a cause of action against any of the defendants and the complaint is hereby ORDERED DISMISSED.

SO ORDERED, this 1 day of June, 1977.

/s/ CHARLES A. MOYE, JR.
UNITED STATES DISTRICT JUDGE

[Filed: JUN. 3, 1977]

APPENDIX D

ORDER

(Number and Title Omitted)

This case is presently before the Court on the plaintiff's motion to alter or amend the judgment and on the plaintiff's motion to stay the judgment for costs pending appeal to the Fifth Circuit. The motion to alter or amend is DENIED. The plaintiff's remedy, assuming an error on the part of Judge Knight, was an appeal of the order, not a civil rights action against the judge. *Pierson v. Ray*, 386 U.S. 547 (1967).

The plaintiff's motion to stay the judgment for costs pending appeal is hereby GRANTED.

SO ORDERED, this 28 day of June, 1977.

/s/ CHARLES A. MOYE, JR.
UNITED STATES DISTRICT JUDGE

[Filed: JUN. 30, 1977]

APPENDIX E

CLAIM UPON WHICH PLAINTIFF SEEKS RELIEF

1. The Plaintiff, Pleasant Richard Tally, was a shareholder owning 1000 shares of common stock, par value $1.00 per share of Style Crest Southeast Co., Inc. (hereinafter referred to as Style Crest) since incorporation of that company on November 22, 1966. The other stockholders of the close corporation were the Plaintiff's wife, Frances Marie Tally (also known as Frances White Tally) owning 1650 shares or a majority interest of common stock, par value $1.00 per share, and the Defendant Homer Williams, owning 900 shares of common stock par value $1.00 per share. The Plaintiff was also an outside salesman for the corporation, effectively producing over 90% of the corporate accounts. Style Crest was a manufacturer of early American furniture, and subcontractor for wood items for other furniture manufacturing companies.

2. On or about May 23, 1969, the Plaintiff, Pleasant Richard Tally, and his wife, Frances White Tally, executed jointly and severally a deed to secure debt resulting in an encumbrance on one home owned by them jointly as a personal residence at 1684 Cecelia Drive, N.E., DeKalb County, Atlanta, Georgia, which was not a corporate asset. The deed to secure debt was executed in order to obtain monies to pay the back taxes owed by the corporation, Style Crest.

3. On or about August 29, 1969, Frances White Tally, by her attorney, the Defendant, William P. Johnson, filed for divorce in Superior Court, Coweta Judicial Circuit in Carroll County, Georgia, before the Defendant, Judge Lamar H. Knight.

4. On or about September 4, 1969, the Defendant William P. Johnson, summoned the Plaintiff, in this action, Pleasant Richard Tally, to his law office in Carrollton, Georgia, where in the presence of Frances White Tally, he "fired" the Plaintiff shareholder from his corporation Style Crest. Plaintiff, Pleasant Richard Tally, was not represented by legal counsel at this transaction.

5. On or about September 16, 1969, the hearing for entry of an interlocutory decree of divorce was heard before the Defendant Judge Lamar H. Knight in Superior Court, Coweta Judicial Circuit in Carrollton County, Georgia. The Plaintiff in this action, Pleasant Richard Tally, was, at this hearing, represented by the Defendant Aubrey W. Gilbert acting as his legal counsel. At this hearing, actual fraudulent statements were made by the Defendant William P. Johnson, to the Defendant Lamar H. Knight to the effect that the Plaintiff, Pleasant Richard Tally owned no shareholder interest in Style Crest, despite the fact that the face of the petition for divorce drawn by the Defendant William P. Johnson submitted to the Defendant Lamar H. Knight recited the Plaintiff Pleasant Richard Tally's $1000.00 worth of stock in Style Crest. The fraudulent statements were disputed by the Plaintiff Pleasant Richard Tally from the witness stand and the Defendant Aubrey

W. Gilbert assured the Plaintiff, Pleasant Richard Tally, that no disposition could be made of the corporation or the Plaintiff's shareholder interest in Style Crest.

The Defendant, Judge Lamar H. Knight under color of state authority, in a state proceeding for divorce, without subject matter jurisdiction of the corporation, Style Crest, or of all the shareholders thereof, and without notice or opportunity to be heard as to the respective civil rights of the Plaintiff in this action, Pleasant Richard Tally, as required by the substantive and procedural due process provisions of the 14th Amendment of the United States Constitution and 42 U.S.C. § 1983, did deliberately and unconstitutionally transfer possession and control of the entire interest in Style Crest to Frances White Tally, the plaintiff in the state proceeding for divorce.

The Defendant, Judge Lamar H. Knight did further, in open court, verbally, restrain the Plaintiff in this action, Pleasant Richard Tally from entering the premises of Style Crest, by court order on pain of incarceration in effect locking the Plaintiff, Pleasant Richard Tally out of Style Crest and thus depriving the Plaintiff of his constitutionally protected property right — the right to earn a living as a furniture salesman for Style Crest — which was protected and secured by the Plaintiff's ownership of 1000 shares of stock in Style Crest. The Defendant, Aubrey W. Gilbert, then representing the Plaintiff, Pleasant Richard Tally, did not protest this deprivation by fraud of

the constitutional right to earn a living and enjoy ownership of stock in Style Crest, perpetrated by the Defendant William P. Johnson and compounded by the Defendant Judge Lamar H. Knight.

The Plaintiff, Pleasant Richard Tally had no opportunity to secure and produce evidence of his ownership of stock, namely the stock certificate evidencing his 1000 shareholder interest in Style Crest. The Court had only subject matter jurisdiction of the parties for purposes of the pending divorce proceeding, yet the Interlocutory decree of divorce recited that possession and control of Style Crest were transferred to Frances White Tally. This action of the part of the Defendant Judge Lamar H. Knight, effecting disposition of Style Crest, its shareholders' interests which thereby deprived Plaintiff Pleasant Richard Tally of his right to earn a living should he attempt to pursue his livelihood by returning to the premises of Style Crest, under a present imminent threat of confinement in a State jail for contempt of Court rendered this aspect of the decision in the divorce proceeding a complete judicial nullity. Such State action, being null and void, completely stripped the Defendant, Judge Lamar H. Knight of any judicial immunity.

6. On or about February 26, 1970, Frances White Tally, by her attorney, the Defendant William P. Johnson, filed a civil action in the City Court of Carrollton Georgia styled "Frances W. Tally v. Glas-Foam Corporation, John R. Creighton, and Leslie D. Igleheart" Civil Action No. 3310. The

suit alleged breach of contract for failure of Glas-Foam Corporation to tender $65,000 after transfer by Frances White Tally of her majority interest in Style Crest. The face of the contract between Frances White Tally and Glas-Foam Corporation, executed October 7, 1969, recited the Plaintiff's, Pleasant Richard Tally, shareholder interest, i.e., 1000 shares of Style Crest.

7. On or about February 26, 1970, the United States Internal Revenue Service sold the machinery, buildings and land owned by Style Crest to pay back taxes. The Defendant, Homer Williams, Secretary-Treasurer of Style Crest in breach of his fiduciary duty to Style Crest was the only bidder, bidding $15,000 for all Style Crest assets on behalf of Temple Manufacturing Company whose corporate officers are the Defendants William P. Johnson and Homer Williams.

8. On or about March 17, 1970, the final decree of divorce between Frances White Tally and Plaintiff in this action, Pleasant Richard Tally was entered by the Defendant Judge Lamar H. Knight in the Superior Court in Carrollton, Georgia. No further testimony was taken prior to entry of the final decree of divorce; however, the Plaintiff, Pleasant Richard Tally was induced to make an increase in child support from $120.00 per month awarded in the interlocutory decree to $150.00 per month in the final decree. Such increase was negotiated by Plaintiff's legal counsel in that action for divorce, Defendant Aubrey W. Gilbert with the Defendant William P. Johnson, legal

counsel for Frances White Tally in that action for divorce, for and in consideration of a quitclaim deed for three lots (real property) owned by the corporation Style Crest, whose total assets had been sold by the Internal Revenue Service to the Defendants William P. Johnson and Homer Williams, officers of Temple Manufacturing Co. on February 26, 1970. The modification of the child support provision was suggested by William P. Johnson with intent to defraud the Plaintiff in this action Pleasant Richard Tally, in that the quitclaim deed could pass no interest to Pleasant Richard Tally. The Defendant Judge Lamar H. Knight made the modification a part of the final decree of divorce.

9. On or about August 25, 1970, the quitclaim deed, mentioned in the preceding paragraph, was mailed by the Defendant Aubrey W. Gilbert to the Plaintiff, Pleasant Richard Tally. When the Plaintiff, Pleasant Richard Tally went to record the quitclaim deed at the Carroll County Courthouse on August 31, 1970, he discovered that the conveyance evidenced by the quitclaim deed was preceeded in the Grantee Index by recordation of a conveyance from the Internal Revenue Service to Temple Manufacturing Company whose officers are the Defendants William P. Johnson and Homer Williams, the I.R.S. conveyance being recorded by them on August 24, 1970.

10. The Plaintiff, Pleasant Richard Tally, due to the fraud perpetrated by the Defendants, under color of state authority, was deprived of his civil rights

under 42 U.S.C. § 1983 in violation of due process of law guaranteed by the 14th Amendment to the United States Constitution, and as a direct result was unemployed from August 31, 1969 until February 15, 1973 when he finally obtained work with Bendix Corporation — not as a salesman. The Plaintiff, Pleasant Richard Tally has never been able to return to work as an outside salesman of furniture.

11. The Plaintiff, Pleasant Richard Tally remains obligated to this day to pay monthly installments on the deed to secure debt (noted in paragraph 2 which had been executed to obtain monies to pay back corporate taxes of Style Crest) ranging from $118.00 to $93.04 per month.

12. The Plaintiff, Pleasant Richard Tally's constitutional right of "liberty" has been abridged. The deprivation of the right to earn a living, plus the stigma of having to state to subsequent prospective employers that he, Pleasant Richard Tally, had been "fired" from his own corporation, Style Crest, equals the liberty interest envisioned and protectable under 42 U.S.C. § 1983.

WHEREFORE PLAINTIFF prays that this Court grant the following relief:

(1) an accounting of the corporate assets of Style Crest;

(2) payment of lost dividends of his shareholder interest in Style Crest from the

time that he was "fired", measured by the net profit of Temple Manufacturing Company;

(3) $700,000 in compensatory damages (wages, commissions, salary, bonuses, lost earnings, unpaid expenses, etc.) plus be paid to him;

(4) $60,000 in attorneys fees or reasonable attorney's fees be paid to him;

(5) punitive damages be assessed;

(6) and any other legal or equitable relief deemed by this Court to be just and appropriate

(7) that all damages and relief be assessed against each and all defendants, jointly and severally.

by Counsel for Plaintiff

Richard A. Straser
1320 Ft. Myer Drive
Suite 812
Arlington, Virginia 22209
Tel. # 703-557-9550

C. E. Allen
2781 Galahad Drive, N.E.
Atlanta, Georgia 30345
Tel. # 634-5934

APPENDIX F

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

PLEASANT RICHARD TALLY,
Plaintiff,

versus C.A. No. C-77-359A

WILLIAM P. JOHNSON, et al.,
Defendants.

NOTICE OF MOTION

TO:

RICHARD A. STRASER
1320 Ft. Myer Drive
Suite 812
Arlington, VA 22209

CHARLES L. GOODSON
11 Perry Street
Newnan, GA 30263

C. EDWARD ALLEN
2781 Galahad Drive, N.E.
Atlanta, GA 30345

TOMMY GREER
202 Tanner Street
P. O. Box 798
Carrollton, GA 30117

Please take notice that the defendant Judge Lamar Knight has filed the attached Motion to Dismiss in this matter. The Clerk is requested to submit the Motion and accompanying brief to the Court in accordance with the Local Rules.

This 21st day of April, 1977.

/s/ DON A. LANGHAM
DON A. LANGHAM
First Assistant Attorney General
(Counsel for Defendant Judge Lamar Knight)

PLEASE ADDRESS ALL
COMMUNICATIONS TO:

DON A. LANGHAM
First Assistant Attorney General
140 State Judicial Building
Atlanta, Georgia 30334

Telephone: (404) 656-3392

MOTION TO DISMISS

(Number and Title Omitted)

Defendant Superior Court Judge Lamar Knight moves this Court pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, to dismiss this action against him on the grounds that:

1.

Plaintiff has failed to state a cause of action against this defendant;

2.

The doctrine of judicial immunity requires a dismissal; and

3.

The statute of limitations for the alleged cause of action has expired.

A brief in support of this motion is filed herewith.

Respectfully submitted

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant Attorney General

/s/ DON A. LANGHAM
DON A. LANGHAM
First Assistant Attorney General

PLEASE ADDRESS ALL
COMMUNICATIONS TO:

DON A. LANGHAM
First Assistant Attorney General
140 State Judicial Building
Atlanta, Georgia 30334

Telephone: (404) 656-3392

BRIEF IN SUPPORT OF MOTION TO DISMISS

(Number and Title Omitted)

I.

STATEMENT OF THE FACTS

According to the allegations in the complaint, the plaintiff in this action was a defendant in a divorce action brought in the Carroll County Superior Court in 1969 by his then spouse, Mrs. Frances White Tally. The divorce action was heard by Superior Court Judge Lamar Knight.

According to the allegations in paragraph 5 of the instant complaint, on or about September 16, 1969, Judge Knight held a hearing prior to the entry of an interlocutory order in the divorce action. Paragraph 5 of the complaint further states that as a result of the September 16, 1969 hearing, Judge Knight caused the transfer of certain personal property to the plaintiff's wife, and issued an oral order restraining the plaintiff from entering the premises of a corporation which the complaint alleges was owned primarily by the plaintiff and his wife. According to the complaint, these actions by Judge Knight "rendered this aspect of the decision in the divorce proceeding a complete judicial nullity."

Paragraph 5 of the complaint also contains the somewhat astounding conclusion that this action (presumably that referenced in the preceding paragraph) "being null and void, completely stripped the Defendant, Judge Lamar H. Knight, of any judicial immunity."

There is no other allegation in the complaint concerning alleged activities of Judge Knight which might be involved in this civil rights action which is brought pursuant to 42 U.S.C. §1983.

II.

ARGUMENT AND CITATION OF AUTHORITY

A. *The complaint fails to state a cause of action against Judge Knight and should be dismissed under the doctrine of judicial immunity.*

The United States Supreme Court has ruled that a judge may not be held personally liable for his judicial actions while acting upon matters within the scope of his jurisdiction, regardless of his personal intent, the damage suffered by a litigant appearing before him, and regardless of how erroneous his judgment may be. This immunity is complete and absolute. *Bradley v. Fisher*, 13 Wall (U.S.) 335, 20 L. Ed. 646 (1871); *Guedry v. Ford*, 431 F.2d 660 (5th Cir. 1970); *Williams v. Sepe*, 487 F.2d 913 (5th Cir. 1973). This doctrine of judicial immunity is applicable to civil rights actions brought pursuant to 42 U.S.C. §1983. *Pierson v. Ray*, 386 U.S. 547, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967).

As the United States Supreme Court said in *Pierson v. Ray, supra.*:

> "It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that allow the most intense feelings in the litigants. *His*

> *errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption.* Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation." 18 L. Ed. 2d 288, 295 [Emphasis Added]

The case *sub judice* is a typical example of the evil with which the United States Supreme Court expressed its concern in both *Bradley, supra*, and *Pierson, supra*. The plaintiff in this case is obviously unhappy with the results of the divorce litigation which took place some eight (8) years ago. How does he react? He brings suit against his own attorney, his ex-spouse's attorney, and the judge who heard the case. The judicial process would quickly breakdown if a judge could not act in a forthright fearless manner in making his judicial decisions.

It is a well settled rule of law in this country that as long as a judge has jurisdiction over the person appearing before him and over the subject matter of the case then pending, he is entitled to absolute immunity concerning his decisions notwithstanding the fact that a particular act, decision, outcome, or criminal penalty, might exceed his jurisdiction. *Randall v. Brigham*, 7 Wall (U.S.) 523, 19 L. Ed. 285 (1869); *Johnson v. MacCoy*, 278 F.2d 37 (9th Cir. 1960); *Collins v. Moore*, 441 F.2d 550 (5th Cir. 1971). As the Fifth Circuit said in *Williams v. Sepe, supra.*:

> ". . . the test for the abrogation of judicial immunity is whether there is a *clear* absence of

all jurisdiction over the subject matter (citing *Bradley v. Fisher, supra.*). The policy underlying the doctrine requires that its application not depend upon the determination of 'nice questions of jurisdiction.' " 487 F.2d 913, 914 (5th Cir. 1973) [Emphasis in Original]

With that background in mind, a careful review of the allegations in the plaintiff's complaint, as they relate to Judge Knight, fail to disclose any allegations which should cause this Court to pause for even a moment before dismissing Judge Knight from this action under the doctrine of judicial immunity. As was pointed out in the Statement of Facts above, the only portion in the complaint which could conceivably give rise to any cause of action against Judge Knight is paragraph 5. In that paragraph the plaintiff states that Judge Knight conducted a hearing concerning an interlocutory decree in a divorce proceeding. There is no question but that a superior court judge in Georgia has jurisdiction to adjudicate divorce actions. See Georgia Constitution of 1945, Art. VI, Sec. IV, Par. I (Ga. Code Ann. §2-3901). The statutes amplifying the constitutional jurisdiction clearly grant the Superior Court the authority to issue an order granting such temporary alimony as the condition of the husband and the facts of the case may justify. Ga. Code Ann. §30-202. The statute further authorizes the judge to consider the peculiar necessities of the wife and make appropriate disposition of property. Ga. Code Ann. §30-203. Thus, there can be absolutely no question but that Judge Knight had jurisdiction over the divorce action in the Superior Court of Carroll County and had the authority to grant temporary disposition of the property pending the final decree of divorce.

The gravamen of plaintiff's allegations against Judge Knight seem to evolve around an allegation that the Judge caused the transfer of possession and control of a corporation owned by the plaintiff and his spouse to the spouse in that order following the September 16, 1969 hearing. If that is the case, and even assuming *arguendo* that such an order went beyond the scope of the Court's jurisdiction (which Judge Knight vigorously denies), it was at most a situation where a Judge exceeded his jurisdiction rather than a situation where the conduct of the proceeding was wholly beyond the jurisdiction of the Court. Such a situation requires the application of judicial immunity. *Bradley v. Fisher, supra.; Collins v. Moore, supra.*

Plaintiff's second concern with respect to Judge Knight's judicial activity at the September 16, 1969 hearing (which is also referenced in paragraph 5 of the complaint) is that Judge Knight "verbally restrained" the plaintiff from entering upon the premises of the jointly owned corporation "on pain of incarceration." Again taking the complaint at its face value for argument purposes only, there is no doubt but that a superior court judge, acting in a divorce action, has the authority to direct the parties to conduct themselves in such a manner as not to interfere with the lives and livelihood of the other party.

Finally, and without any attempt to belabor the point, even if the Court committed error in either of these two actions, the plaintiff should have had that error corrected by appeal and is not entitled to bring a civil rights action against the judge. *Pierson v. Ray, supra.*

B. *The complaint fails to state a cause of action because the statute of limitations has expired prior to the commencement of this action.*

According to the allegations in the complaint, the cause of action against Judge Knight must have arisen, if at all, as a result of his judicial actions taken on September 16, 1969. The instant action was filed on March 28, 1977.

In a federal action brought pursuant to 42 U.S.C. §1983, the court will look to the period of limitation which a state court would apply had the action seeking a similar relief been brought in the state court. *Knowles v. Carson,* 419 F.2d 369 (5th Cir. 1969); *Nevels v. Wilson,* 423 F.2d 691 (5th Cir. 1970).

The federal court, in determining the applicable statute of limitations, must look to the state limitations on causes of action most nearly analogous to the ones presented in the complaint. *Knowles v. Carson, supra.; Harkless v. Sweeny Independent School District,* 388 F. Supp. 738 (S.D. Tex. 1975); *Sotonoura v. County of Hawaii,* 402 F. Supp. 95 (D. Hawaii 1975).

The complaint is not absolutely clear as to the theory under which plaintiff is proceeding. However, the applicable statute of limitations must be found either in Ga. Code Ann. §3-1002, which provides that actions or injuries to personalty shall be brought within four years after the right of action accrues, or in Ga. Code Ann. §3-1003, which provides that all suits for damages or conversion of personal property shall be brought within four years after the right of action

accrues. In either event, plaintiff was limited to a four-year statute of limitations, which has long since expired.

CONCLUSION

Granting all presumptions in favor of plaintiff, as is required when the Court rules on a motion by a defendant to dismiss for failure to state a claim upon which relief can be granted, the complaint clearly fails to state a cause of action against Coweta Judicial Circuit Superior Court Judge Lamar Knight, and his motion to dismiss should be granted since he is entitled to judicial immunity and the statute of limitations has expired.

Respectfully submitted

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

/s/ DON A. LANGHAM
DON A. LANGHAM
First Assistant
Attorney General

PLEASE ADDRESS ALL
COMMUNICATIONS TO:

DON A. LANGHAM
First Assistant Attorney General
140 State Judicial Building
Atlanta, Georgia 30334

Telephone: (404) 656-3392

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Pleasant Richard Tally
(a.k.a. Dick Tally)
a resident of Virginia

Plaintiff

versus C.A. No. C77-359 A

William P. Johnson,
Homer Williams,
Aubrey W. Gilbert and
Lamar H. Knight
residents of Georgia

Defendants

PLAINTIFF'S RESPONSIVE BRIEF TO DEFENDANT LAMAR H. KNIGHT'S MOTION TO DISMISS

Comes now the Plaintiff, Pleasant Richard Tally, in the above styled civil action, in response to Defendant Lamar H. Knight's Motion to Dismiss identified pursuant to Rule 12 (b) of the Federal Rules of Civil Procedure for the United States District Courts, as amended, 28 U.S.C., on the ground that said Complaint fails to state a claim upon which relief can be granted.

Defendant Lamar H. Knight proffers two bases in support of his motion: (1) that the Defendant, Lamar H. Knight, is not amenable to suit under 42 U.S.C. Section 1983, relying upon the doctrine of judicial immunity, and (2) that the applicable Statute of Limitations had expired prior to the commencement of the action.

Following proper notice to Counsel for the Defendant, Lamar H. Knight, Plaintiff herein requests that said Motion be scheduled for hearing on a day certain and that said Motion be denied based upon the following reasons:

(a) the Amended Complaint factually alleges a *clear* absence of subject matter jurisdiction of Style Crest Southeast Co., Inc., in the state proceeding brought by Frances White Tally against Pleasant Richard Tally for divorce. The state court proceeding for divorce, presided over by Defendant Lamar H. Knight, had neither *in personam* nor *in rem* jurisdiction over the legal entity, Style Crest. On these facts, as pleaded, the rule in *Bradley v. Fisher* applies and the doctrine of judicial immunity cannot be invoked to shield the Defendant, Lamar H. Knight, from liability under 42 U.S.C. Section 1983.

(b) The rules of law enunciated in *Pierson v. Ray*, *Guedry v. Ford* and *Williams v. Sepe* are not applicable to the claim pleaded before this Court because in each case the Court found that subject matter jurisdiction, through *in personam* or *in rem* process, was present. Once subject matter jurisdiction is present, a judge acting in excess of authority or with malicious

or corrupt motivation is shielded by the doctrine of judicial immunity.

(c) Knowledge of or reckless disregard of the *clear* absence of subject matter jurisdiction and the malicious participation in the abuse of state court process which deprives this Plaintiff of his right to earn a living makes the Defendant, Lamar H. Knight, liable under 42 U.S.C. Section 1983.

(d) Plaintiff's Amended Complaint does not allege injury to personalty or conversion of personalty, but the deprivation of the fundamental right to earn a living. Therefore, *Georgia Code Annotated* Sections 3-1002 (Personalty) and 3-1003 (Conversion of Personalty) do not apply to the facts pleaded so as to bar relief against Defendant Lamar H. Knight.

I.

PLAINTIFF'S RESPONSE TO DEFENDANT LAMAR H. KNIGHT'S STATEMENT OF FACTS

The Plaintiff, Pleasant Richard Tally, has factually alleged in paragraph 2 of Count 5 of the Amended Complaint that:

> "The Defendant, Judge Lamar H. Knight, under color of state authority, in a state proceeding for divorce, *without subject matter jurisdiction of the corporation, Style Crest, or of all the shareholders thereof,* (emphasis our own) and without notice or opportunity to be heard as to

> the respective civil rights of the Plaintiff in this action, Pleasant Richard Tally, as required by the substantive and procedural due process provisions of the 14th Amendment of the United States Constitution and 42 U.S.C. Section 1983, did deliberately and unconstitutionally transfer possession and control of the entire interest in Style Crest to Frances White Tally, the plaintiff in the state proceeding for divorce."

Plaintiff respectfully draws this Court's attention to the *key* phrase in the foregoing exerpt from the Amended Complaint; that is, "without subject matter jurisdiction of the corporation, Style Crest, or of all the shareholders thereof." In this concept, "without jurisdiction", lies the basis for liability of the Defendant, Lamar H. Knight, to this Plaintiff, Pleasant Richard Tally.

Plaintiff's paragraph 4 of Count 5 of the Amended Complaint states, in part, that:

> "The Plaintiff, Pleasant Richard Tally, had no opportunity to secure and produce evidence of his ownership of stock; namely, the stock certificate evidencing his 1000 shareholder interest in Style Crest."

Defendant's counsel has stated to this Court that: "as a result of the September 16, 1969 hearing, Judge Knight caused the transfer of certain personal property to the plaintiff's wife . . . ." The Plaintiff responds that neither Frances White Tally nor Pleasant Richard Tal-

ly produced any shareholder certificates during the interlocutory hearing for divorce. Therefore, no personalty, such as shareholder stock certificates, was or could be transferred or converted on September 16, 1969, by the Defendant, Lamar H. Knight.

Further, Defendant's counsel has also stated to this Court that: "the complaint alleges (the corporation, Style Crest,) was owned primarily by the plaintiff and his wife." Count 1 of the Amended Complaint recites that the corporation, Style Crest, had three shareholders, Frances White Tally, Pleasant Richard Tally and Homer Williams. It is crucial to understand that to effect transfer and possession of a Georgia corporation requires subject matter jurisdiction of the corporation to have been properly before Judge Knight. This is done either by attachment of corporate assets of the corporation, giving rise to *in rem* jurisdiction; or by proper joinder of the third shareholder, Homer Williams, to the divorce proceedings, giving rise to *in personam* jurisdiction. If this is understood, it is not astounding from the clear absence of subject matter jurisdiction before Judge Knight that this transfer "rendered this aspect of the decision in the divorce proceeding a complete judicial nullity" and "being null and void, completely stripped the Defendant, Lamar H. Knight, of any judicial immunity." Yet the Motion to Dismiss, now before this Court, grants all facts pleaded as admitted and all inferences from those facts for purposes of the motion. This Court has been advised not to pause even for a moment before dismissing Judge Knight from this suit. The Plaintiff is certain that this Court spent more than than just one minute reading the Amended Complaint.

Exhibit No. 1, attached hereto, is a copy of the notice of publication of the incorporation in Carroll County, Georgia, of the corporation, Style Crest Southeast Co., Inc., showing the incorporators, Frances White Tally, Pleasant Richard Tally and Homer Williams, signed by the Defendant, Lamar H. Knight, and dated November 22, 1966.

II

A. THE AMENDED COMPLAINT FACTUALLY ALLEGES A *CLEAR* ABSENCE OF SUBJECT MATTER JURISDICTION OF STYLE CREST SOUTHEAST CO., INC., IN THE STATE PROCEEDING BROUGHT BY FRANCES WHITE TALLY AGAINST PLEASANT RICHARD TALLY FOR DIVORCE. THE STATE COURT PROCEEDING FOR DIVORCE, PRESIDED OVER BY DEFENDANT LAMAR H. KNIGHT, HAD NEITHER *IN PERSONAM* NOR *IN REM* JURISDICTION OVER THE LEGAL ENTITY, STYLE CREST. ON THESE FACTS, AS PLEADED, THE RULE IN *BRADLEY V. FISHER* APPLIES AND THE DOCTRINE OF JUDICIAL IMMUNITY CANNOT BE INVOKED TO SHIELD THE DEFENDANT, LAMAR H. KNIGHT, FROM LIABILITY UNDER 42 U. S. C. SECTION 1983.

It is the general rule that where a judge has jurisdiction he is not civilly liable for acts done in the exercise of his judicial function. Jurisdiction is defined as

the authority to act officially in the disposition of the matter at hand. The disposition complained of in this lawsuit is the transfer of possession and control of the Georgia corporation, Style Crest Southeast Co., Inc., by Defendant Lamar H. Knight, in a divorce proceeding in the *clear* absence of jurisdiction of Style Crest. Service of state court process never issued against the corporate assets of Style Crest nor against all the shareholders of Style Crest so as to properly have the corporate entity before the divorce court. A judicial act is one performed by a judge upon parties or property before his court by *in personam* or *in rem* attachment of subject matter jurisdiction by the power of process. If attachment by process exists, the exercise by a judge of his state granted authority is privileged. He is immune from civil liability whether his disposition exceeds his statutory authority or whether the disposition is prompted by corrupt or malicious motivation. In order to foster integrity and independence of the judiciary, courts have consistently held that an appeal of an excessive exercise or a corrupt or malicious exercise of authority was the plaintiff's remedy. The premise for such consistent holdings has been a threshold finding of the existence before the judge of subject matter jurisdiction. Acts performed wholly without subject matter jurisdiction are not judicial acts. They are null and void acts which have also been termed complete judicial nullities. The remedy for non-judicial acts differs from judicial acts. An appeal of a non-judicial act may not restore the rights of the party injured. Since the public policy of integrity and independence of the judiciary is not fostered by non-judicial acts, the usurpation of judicial power by a state judge strips the usurper of the protec-

tion of judicial immunity. Judges of limited or general statutory jurisdiction are treated the same. Each may be divested of immunity to civil liability by the usurpation of judicial power to act, in the clear absence of authority to act. The remedy, then available to the plaintiff, would depend upon the rights infringed by the non-judicial acts. The Civil Rights Act of 1871, now codified as 42 U. S. C. Section 1983, is the proper remedy when the plaintiff alleges the deprivation of property and liberty rights; that is, the right to earn a living, secured by part ownership of the business out of which the living is pursued, protectable as fundamental rights of all U. S. citizens.

In summary, state judges with authority to act, because subject matter jurisdiction through process is present, act judicially and therefore are immune. The immunity is not incomplete because the judicial acts are in excess of state granted power; or are motivated by personal corrupt or malicious attitude. But state judges without authority to act, because there is a clear absence of subject matter jurisdiction through lack of process, do not act judicially and are therefore not immune to civil liability. In the latter situation, the usurper risks the perils of any exercise of state conferred powers and his good faith or innocent motivations are no defense, for no excuse is permissible. This differentiation is more fully discussed in 46 *Am Jur 2d*, Judges Sections 72 - 84; 46 *Am Jur 2d*, Justices of the Peace Sections 18 - 24.

On the facts pleaded by this Plaintiff before this Court the rule in *Bradley v. Fisher*, 13 Wall (U.S.) 335, 20 L. Ed. 646 (1871) applies and the doctrine of judicial

immunity cannot be invoked to shield the Defendant, Lamar H. Knight, from liability under 42 U.S.C. Section 1983. Mr. Justice Field, in delivering the opinion of the Court, explained the circumstances under which liability would lie by the following illustration:

> "Thus, if a probate court, invested only with authority over wills and the settlement of estates of deceased persons, should proceed to try parties for public offenses, jurisdiction over the subject of offenses being entirely wanting in the court, and this being necessarily known to its judge, his commission would afford no protection to him in the exercise of the usurped authority. But if, on the other hand, a judge of a criminal court, invested with general criminal jurisdiction over offenses committed within a certain district, should hold a particular act to be a public offense, which is not by the law made an offense, and proceed to the arrest and trial of a party charged with such act, or should sentence a party convicted to a greater punishment than that authorized by the law upon its proper construction no personal liability to civil action for such acts would attach to the judge, although those acts would be in excess of his jurisdiction, or of the jurisdiction of the court held by him, for these are particulars for his judicial consideration, whenever his general jurisdiction over the subject-matter is invoked." p. 352.

B. THE RULES OF LAW ENUNCIATED IN *PIERSON V. RAY, GUEDRY V. FORD* AND *WILLIAMS V. SEPE* ARE NOT APPLICABLE TO THE CLAIM PLEADED BEFORE THIS COURT BECAUSE IN EACH CASE THE COURT FOUND THAT SUBJECT MATTER JURISDICTION, THROUGH *IN PERSONAM* OR *IN REM* PROCESS, WAS PRESENT. ONCE SUBJECT MATTER JURISDICTION IS PRESENT, A JUDGE ACTING IN EXCESS OF AUTHORITY OR WITH MALICIOUS OR CORRUPT MOTIVATION IS SHIELDED BY THE DOCTRINE OF JUDICIAL IMMUNITY.

In *Pierson v. Ray*, 386 US 547, 87 S Ct 1213, 18 L Ed 2d 288 (1967), the plaintiffs were arrested by municipal police officers on charges of violating a state breach-of-peace statute while attempting to use the segregated facilities of an interstate bus terminal. They were convicted on the charges when brought before a municipal police justice. On appeal to the County Court, one plaintiff was acquitted; the charges against the others were dropped. In an action in U.S. District Court under 42 U.S.C. Section 1983, the plaintiffs sought money damages against the municipal police justice and the police officers. The jury returned a verdict for the defendants and the plaintiffs appealed. The Court of Appeals for the Fifth Circuit held that the judge was immune under 42 U.S.C. Section 1983. The U.S. Supreme Court, in reviewing the record below, stated:

"The record is barren of any proof or specific allegation that Judge Spencer played any role in these arrests and convictions other than to adjudge petitioners guilty when their cases came before his court."

"It is a judge's duty to decide all cases within his jurisdiction that are brought before him." (18 L Ed 2d 288, at 294.)

The *key* concepts here are (1) *in personam* jurisdiction (by arrest) of the parties before the court existed; and (2) the disposition of the matter at hand; namely, the adjudication of the guilt or innocence of the parties could be properly upheld because the proceeding was one for breach of the peace. The "due process" requirements of notice and opportunity to be heard were fulfilled. Relating these concepts to the case before this Court, we find (1) a lack of *in personam* or *in rem* jurisdiction of the corporation, Style Crest, before Judge Knight's court; and (2) the disposition of the matter at hand; namely, the transfer of possession and control of the Georgia corporation could not properly be maintained because the proceeding was not one for a declaration of respective rights in the corporation, but one for divorce between parties who did not represent the entire interests in the corporation. The "due process" requirement of notice and opportunity to be heard by all interest holders was not fulfilled.

Pierson v. Ray, supra, does not deal with a specific allegation that subject matter jurisdiction was lacking before the municipal police justice. *Pleasant Richard Tally v. William P. Johnson, et. al.* does

specifically allege lack of subject matter jurisdiction. The deprivation of this Plaintiff's civil rights was proximately caused by this null and void disposition of the corporate entity, Style Crest Southeast Co., Inc.

In *Williams v. Sepe*, 487 F 2d 913 (5th Cir. 1973), plaintiff brought a civil rights action against a judge who attempted to investigate a report that the plaintiff had misrepresented himself as the judge's law clerk without giving the plaintiff written notice of the criminal contempt charge as required by the Florida Code of criminal procedure. The court held that "the defects in the procedure *employed* (emphasis our own) will not support a conclusion that there was a clear absence of all jurisdiction." The reason this conclusion is sound is because the plaintiff in *Williams v. Sepe* was personally before Judge Sepe and procedural irregularities do not rise to the standard of clear absence when irregular *in personam* jurisdiction exists. Plaintiff maintains that he has alleged a lack of all jurisdiction, a failure of any procedure being employed, in regard to Style Crest by the Defendant, Lamar H. Knight.

In *Guedry v. Ford*, 431 F 2d 660 (1970), plaintiff filed a civil rights action against a District Attorney and a city court judge who had charged, tried, convicted and sentenced him unfairly on a charge of making harassing telephone calls. The gist of the suit by the plaintiff was a charge of conspiracy to deprive civil rights. The court held that "(T)he subject matter of the charges against the plaintiff, Allen T. Guedry, Jr. fall within the jurisdiction and purview of the City Court of Hammond (presided over by the defendant judge, Ford)."

Based upon the court's finding that the only complaint of the plaintiff in *Guedry* was that he did not get a fair trial the civil rights action was dismissed. Again, this case is not on point with the case pleaded by this Plaintiff. The corporation, Style Crest, was not sued or indicted, tried and convicted. Neither party attempted to divorce the corporation, but divorce each other.

C. KNOWLEDGE OF OR RECKLESS DISREGARD OF THE *CLEAR* ABSENCE OF SUBJECT MATTER JURISDICTION AND THE MALICIOUS PARTICIPATION IN THE ABUSE OF STATE COURT PROCESS WHICH DEPRIVES THIS PLAINTIFF OF HIS RIGHT TO EARN A LIVING MAKES THE DEFENDANT, LAMAR H. KNIGHT, LIABLE UNDER 42 U.S.C. SECTION 1983.

In *Osbekoff v. Mallory*, 188 NW 2d 294 (Iowa 1971), annotated in 64 ALR 3d 1242, a town mayor, acting as a magistrate of a mayor's court, was held not immune from liability for abuses of process to collect a civil debt and by delivering the plaintiff's automobile to the dealer-creditor without plaintiff's consent. The Court reversing judgment of dismissal of the action in the lower court as barred by the doctrine of judicial immunity noted that the plaintiff had not voluntarily submitted to the jurisdiction of the mayor's court to deal with his property. The Court stated that his mere presence in the mayor's court in answer to the criminal charge against him had not given the mayor, acting as a magistrate, jurisdiction in any proceeding to

hear and determine the plaintiff's rights in his automobile, since no matter had been pending in the mayor's court involving the plaintiff's property rights in the automobile and no process had been issued by the mayor's court justifying seizure of the automobile by the court. The Court in discussing the doctrine of judicial immunity stated that it extended to courts of limited jurisdiction and further stated that when a magistrate acts wholly without jurisdiction, civil liability attaches for his malicious abuse of state process under the pretense of acting in his official capacity. Thus, the Court concluded that the lower court erred in dismissing the action for it appeared that the plaintiff had not failed to state a claim for relief under any set of facts which could be proven.

The facts are on point. Pleasant Richard Tally had not voluntarily submitted himself to the jurisdiction of Judge Knight's court to deal with his shareholder interest in Style Crest or his right to earn a living secured by this ownership. His mere presence before Judge Knight did not cure the pretense of authority to act. No matter involving Style Crest was then pending and no process issued against Style Crest. Yet Defendant Lamar H. Knight signed over possession and control of Style Crest, for which action alone he is amenable to suit in this Court under 42 U.S.C. Section 1983 because he deprived this Plaintiff of the right to earn a living.

D. PLAINTIFF'S AMENDED COMPLAINT DOES NOT ALLEGE INJURY TO PERSONALTY OR CR CONVERSION OF PERSONALTY, BUT THE DEPRIVA-

TION OF THE FUNDAMENTAL RIGHT TO EARN A LIVING. THEREFORE, *GEORGIA CODE ANNOTATED* SECTIONS 3-1002 (PERSONALTY) AND 3-1003 (CONVERSION OF PERSONALTY) DO NOT APPLY TO THE FACTS PLEADED SO AS TO BAR RELIEF AGAINST DEFENDANT LAMAR H. KNIGHT.

Plaintiff's Amended Complaint alleges, in part, that on September 16, 1969, Defendant Lamar H. Knight presided as a Superior Court Judge in a civil action for divorce brought by Frances White Tally against this Plaintiff, Pleasant Richard Tally. The court on September 16, 1969, had only subject matter jurisdiction of the parties, Frances White Tally and Pleasant Richard Tally, for purposes of the pending divorce proceeding. However, the interlocutory decree of divorce recited that possession and control of Style Crest Southeast Co., Inc., a Georgia corporation, were transferred to Frances White Tally. The Georgia corporation, Style Crest, had three shareholders, Frances White Tally, Pleasant Richard Tally and Homer Williams. Homer Williams was not a party to the divorce proceeding before Defendant Lamar H. Knight on September 16, 1969. The interlocutory decree of divorce signed by Judge Knight on that date, effecting disposition of Style Crest and its shareholders' interests, was a complete judicial nullity — a null and void act — because the state court presided over by the Defendant, Lamar H. Knight, had neither *in personam* nor *in rem* subject matter jurisdiction. This action performed by the Defendant, Lamar H. Knight, under color of state law, in the clear absence of

jurisdiction, deprived this Plaintiff of the fundamental right to earn a living protectable under 42 U.S.C. Section 1983. *Georgia Code Annotated* Sections 3-1002 and 3-1003 concerning causes of action for injury to personalty or conversion of personalty are not applicable to the facts pleaded in this claim for relief. The injuries suffered by this Plaintiff, cognizable under 42 U.S.C. Section 1983 before this Court, are (1) the deprivation of the right to earn a living and (2) the stigma attached to the status imposed upon this Plaintiff; that is, this Plaintiff had to state to future employers that he was fired from a corporation of which he owned a substantial shareholder interest. This Plaintiff has not been able to earn a living as an outside salesman of furniture, since the actions of the Defendant, Lamar H. Knight, on September 16, 1969, which actions terminated both his status as a salesman of furniture and part owner of a furniture manufacturing plant. Since these rights have never been restored, each day that passes gives rise to a new offense so that any applicable statute of limitations will never run to bar relief. Further, the Constitution of the State of Georgia, adopted in 1945, and the statutes enacted thereunder make specific grants of jurisdictional authority to Superior Court Judges who are charged with knowledge of their jurisdictional limitations. Dispositions of interests not properly before the court are fraudulent. Since the underlying fraud, lack of subject matter jurisdiction of the Georgia corporation, Style Crest, was only discoverable on November 15, 1976, this claim for relief under 42 U.S.C. Section 1983 based upon the torts of fraud and abuse of process

is not barred. The Defendant, Lamar H. Knight, is liable to this Plaintiff, Pleasant Richard Tally.

Respectfully submitted,

_____

Richard A. Straser

IN THE

Supreme Court of the United States

October Term, 1977

NO. 77-1242

PLEASANT RICHARD TALLY
(a/k/a/ DICK TALLY),
Petitioner,

versus

WILLIAM P. JOHNSON, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT JUDGE H. LAMAR KNIGHT IN OPPOSITION

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

DON A. LANGHAM
First Assistant
Attorney General

PLEASE ADDRESS ALL
COMMUNICATIONS TO:

DON A. LANGHAM
First Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334
Telephone: (404) 656-3392

INDEX

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

IN THE

Supreme Court of the United States

October Term, 1977

NO. 77-1242

PLEASANT RICHARD TALLY
(a/k/a/ DICK TALLY),
Petitioner,

versus

WILLIAM P. JOHNSON, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT JUDGE H. LAMAR KNIGHT IN OPPOSITION

OPINIONS BELOW

The opinions of the United States District Court for the Northern District of Georgia which granted Respondent's Motion to Dismiss and denied Petitioner's Motion to Alter or Amend Judgment are reproduced as Appendix C and D of Petition.

The decisions of the Court of Appeals for the Fifth Circuit in affirming (without comment) and denying Petitioner's Petition for Rehearing are reproduced as Appendix A and B of Petition.

JURISDICTION

While this Court has jurisdiction pursuant to 42 U.S.C. §1254(1), Petitioner's assertion that jurisdiction exists by virtue of Rule 19.1(b) of the Rules of this Court is incorrect.

STATUTE INVOLVED

42 U.S.C. §1983 is set forth in the Petition at page 21.

QUESTION PRESENTED

Respondent Judge Knight does not believe the Petitioner has properly stated the questions presented. In the opinion of this Respondent, the question presented is:

Is a Superior Court Judge, who has jurisdiction to hear divorce actions, entitled to judicial immunity in a 42 U.S.C. §1983 action which is brought by an ex-husband complaining of an Order entered by the Judge in 1969 in his divorce action wherein the Judge had allegedly improperly directed the transfer of ownership of corporate stock from the husband to the wife as part of an award of temporary alimony.

STATEMENT

The Petitioner's "Statement of the Case" in his Petition is extremely confusing and argumentative. Consequently, Respondent Judge Lamar Knight (hereinafter Judge Knight) seeks the Court's indulgence in a restatement of the case as it applies to him.

Judge Knight is and has been for all times relevant to this action, a Judge of the Superior Court of Coweta Judicial Circuit of Georgia, which includes Carroll County, Georgia.

In August, 1969, Petitioner's then wife brought a divorce action against the Petitioner which was heard by Judge Knight in the Carroll County Superior Court. In September, 1969, after a hearing for an interlocutory divorce decree, Judge Knight entered an Order awarding temporary alimony to the Petitioner's wife which, according to Petitioner's complaint, transferred possession and control of a corporation (Style Crest) to the Petitioner's wife. Further, according to the complaint, the Judge "verbally restrained" the Petitioner from entering the premises of the corporation (Petition, pp. 8a-10a).

Petitioner alleges these actions violated his constitutional due process and property rights. Petitioner further alleges that Judge Knight did not have jurisdictional authority to transfer "possession and control" of the corporation to the Petitioner's wife; and therefore, his action was "null and void" and "completely stripped the defendant, Judge H. Lamar Knight of any judicial immunity." (Petition, pp. 10a-11a).

Judge Knight filed a Motion to Dismiss this action for failure to state a claim upon which relief could be granted in that his actions were protected by judicial immunity and that the statute of limitations had expired (Petition, pp. 16a-25a). In an Order granting Judge Knight's Motion to Dismiss on the basis of judicial immunity (as well as motions to dismiss defendants William P. Johnson and Aubrey W. Gilbert) the District Court stated:

> "Despite plaintiff's claims to the contrary, it is clear that Judge Knight had jurisdiction over the divorce proceedings in question and was empowered to make a disposition of plaintiff's share holdings in Style Crest under Ga. Code Ann. §30-203. De-

> fendant Knight is therefore immune to suit under section 1983. *Pierson v. Ray*, 386 U.S. 547 (1967); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1871); *Williams v. Sepe*, 487 F.2d 913 (5th Cir. 1973)." (Petition, p. 5a).

Petitioner then moved "To Alter or Amend a Judgment" and simultaneously filed his Notice of Appeal to the Fifth Circuit Court of Appeals. The District Court denied the Motion, stating:

> "The plaintiff's remedy, assuming error on the part of Judge Knight, was an appeal of the order, not a civil rights action against the judge." citing *Pierson v. Ray, supra.* (Petition, p. 7a).

The Fifth Circuit Court of Appeals affirmed without opinion and denied a petition for hearing.

ARGUMENT

I. THERE IS NO CONFLICT OF DECISIONS.

Despite Petitioner's protestations to the contrary, there is no issue of "national significance" presented in this case, nor is the decision of the Fifth Circuit in conflict with prior decisions of this Court or any other Circuit Court of Appeals, including this Court in *Sparkman v. Stump*, No. 76-1750.

As will be pointed out *infra*, in the case at bar there is no question but that Judge Knight had both subject matter and personal jurisdiction over the divorce action and the Petitioner and his ex-wife in their 1969 divorce litigation. The claim of the Petitioner, in fact, is not that the Court was totally without jurisdiction, but that once having acquired jurisdiction, the Superior Court issued an Order which Petitioner claims exceeded the authority of the Judge in granting a remedy to the ex-wife.

The only "conflict between circuits" which Petitioner raises in his Petition are the Sixth Circuit cases on page 6. Two of these decisions were in favor of the "judge" which supported the doctrine of judicial immunity along the same traditional reasons as did the Fifth Circuit and the District Court in the case at bar. *Lynch v. Johnson*, 420 F.2d 818 (6th Cir. 1970); *Azar v. Conley*, 456 F.2d 1382 (6th Cir. 1972). In *Lucarell v. McNair*, 453 F.2d 836 (6th Cir. 1972), the Sixth Circuit held judicial immunity was not an absolute defense when there was a clear absence of jurisdiction. The Fifth Circuit has never disagreed with any of these decisions.

II. THE DECISION BELOW IS CLEARLY CORRECT.

The gist of Petitioner's allegations against Respondent Judge Knight is that while the Judge was hearing Petitioner's divorce action in the Carroll County Superior Court in 1969, the Judge ordered the transfer of Style Crest Corporation from the Petitioner to his then wife as part of temporary alimony.

Petitioner argues that Judge Knight did not have the authority to perform this act; therefore, he acted outside his jurisdiction and is not protected by judicial immunity.

Taking the allegations of the pleadings (Petition, pp. 8a-15a) at their face value for purposes of a ruling on a Rule 12(b)(6) Motion to Dismiss, the allegations show at best that Judge Knight might have exceeded his jurisdiction in making an improper award of property under Georgia's Temporary Alimony statute.[1] (Ga. Code Ann. §30-202).

---

[1] The only allegation in the complaint alleging improper action of Judge Knight is in paragraph 5 (Petition, pp. 9a-11a).

As will be shown, Petitioner misperceives the application of the judicial immunity principles to this situation, which is practically "on all fours" with the situation in the landmark case of *Bradley v. Fisher*, 13 Wall. (U.S.) 335, 20 L.Ed. 646 (1871), in which this Court laid out the basic rules concerning judicial immunity.

In *Bradley*, the Court held that a Judge may not be held personally liable for his judicial actions while acting upon matters within the scope of his jurisdiction, regardless of whether he exceeds that jurisdiction, and regardless of his personal intent, the damage suffered by a litigant appearing before him, or how erroneous his judgment may be. This immunity is complete and absolute. *Bradley v. Fisher*, 13 Wall. (U.S.) 335, 20 L.Ed. (1871). This doctrine of judicial immunity is applicable to civil rights actions brought pursuant to 42 U.S.C. §1983. *Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed. 2d 288 (1967).

As this Court said in *Pierson v. Ray, supra:*

> "It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that allow the most intense feelings in the litigants. *His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption.* Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation." 386 U.S. 547, 554 [Emphasis added].

The case *sub judice* is a typical example of the evil with which this Court expressed its concern in both *Bradley, supra*, and *Pierson, supra*. The Petitioner in this case is unhappy with the results of the divorce litigation which took place some eight (8) years ago. How does he react? He brings suit against his own attorney, his ex-spouse's attorney, and the Judge who heard the case. The judicial process would quickly break down if a judge could not act in a forthright fearless manner in making his judicial decisions.

It is a well settled rule of law in this country that as long as a judge has jurisdiction over the person appearing before him and over the subject matter of the case then pending, he is entitled to absolute immunity concerning his decisions notwithstanding the fact that a particular act, decision, outcome, or criminal penalty, might exceed his jurisdiction. *Randall v. Brigham*, 7 Wall. (U.S.) 523, 19 L.Ed. 285 (1869); *Collins v. Moore*, 441 F.2d 550 (5th Cir. 1971).

As the Fifth Circuit said in *Williams v. Sepe:*

> ". . . the test for the abrogation of judicial immunity is whether there is a *clear* absence of all jurisdiction over the subject matter (citing *Bradley v. Fisher, supra*). The policy underlying the doctrine requires that its application not depend upon the determination of 'nice questions of jurisdiction.' " 487 F.2d 913, 914 (5th Cir. 1973) [Emphasis in original].

With the background in mind, a careful review of the allegations in the Petitioner's complaint, as they relate to Judge Knight, fails to disclose any allegations which should cause this Court to pause for even a moment before denying the Petition. As was pointed out above, the only portion in the complaint which could conceivably give rise to any cause of action against Judge Knight is paragraph 5. In that paragraph the Petitioner states that Judge Knight conducted a hearing concerning an interlocutory decree in a divorce proceeding. There is no question but that a superior court judge in Georgia in 1969 had jurisdiction to adjudicate divorce actions.

Georgia Constitution of 1945, Art. VI, Sec. IV, Par. I (Ga. Code Ann. §2-3901). The statutes applying that constitutional jurisdiction clearly grant the Superior Court the authority to issue an Order granting such temporary alimony as the condition of the husband and the facts of the case may justify. Ga. Code Ann. §30-202. The statute further authorizes the judge to consider the peculiar necessities of the wife and make appropriate disposition of property. Ga. Code Ann. §30-203. Thus, there is absolutely no question but that Judge Knight had jurisdiction over the divorce action in the Superior Court of Carroll County and had the authority to grant temporary disposition of the property pending the final decree of divorce.

The gravamen of Petitioner's allegations against Judge Knight evolve around the allegation that the Judge caused the transfer of possession and control of a corporation owned primarily by the Petitioner and his spouse to the spouse in the Order following the September 16, 1969, hearing. If that is the case, and even assuming *arguendo* that such an Order went beyond the scope of the Superior Court's jurisdiction (which Judge Knight vigorously denies), it was at most a situation where a judge exceeded his jurisdiction rather than a situation where the conduct of the proceeding was wholly beyond the jurisdiction of the Court. Such a situation requires the application of judicial immunity. *Bradley v. Fisher, supra; Collins v. Moore, supra.*

In the Order denying Petitioner's Motion to Alter or Amend Judgment, the District Court properly pointed out that the Petitioner's remedy was an appeal of the Order in the divorce case, not a civil rights action against the Judge (Petition, p. 7a).

A review of the Georgia case citations support that conclusion of the District Court and point out that such errors are in fact reviewable by the Georgia Supreme Court on appeal. *E.g., Hood v. Hood,* 130 Ga. 610 (1908), (lack of jurisdiction of the husband because of improper service); *Lloyd v. Lloyd,* 183 Ga. 751 (1937), (the Court properly awarded use of home to wife as temporary alimony); *Coweta Bonding Co. v. Carter,* 230 Ga. 585 (1973), (order issued by Superior Court without proper notice to parties reversed on appeal); *In re Prisoners Awaiting Transfer,* 236 Ga. 516 (1976), (Superior Court improperly directing transfer of prisoners reversed on appeal).

Respondent concedes that judges sometimes err and are subject to being reversed on appeal. *However, the method of correction of error is by appeal, not by a civil rights action against the erring judge.*

The Georgia Divorce Law authorized Judge Knight to grant Petitioner's wife temporary alimony from the husband's estate (Ga. Code Ann. §30-202). Acting pursuant to that authority, Judge Knight ordered Petitioner to transfer his shares of Style Crest Corporation to his wife. The Georgia Law also provides that the Court may enforce its orders by contempt proceedings. Ga. Code Ann. §30-204, §24-105 and §24-2615.

Consequently, since Judge Knight had ordered Petitioner to transfer his shares of Style Crest to his wife, the Judge certainly had the authority to direct the Petitioner not to take any actions which would interfere with the wife's use of the property, *Gaston v. Shunk Plow Co.,* 161 Ga. 287, 130 S.E. 580 (1925).

CONCLUSION

Petitioner's allegations against Respondent Judge Knight, treated as true for purposes of ruling on a Motion to Dismiss, show that Judge Knight had jurisdiction to hear Petitioner's divorce action. While judicial error committed during that action could have been corrected by appeal, the Judge committing such error (if it in fact occurred) is protected by judicial immunity. The decision of the District Court dismissing this action was correct, and the Petition should be denied.

Respectfully submitted

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant Attorney General

DON A. LANGHAM
First Assistant Attorney General
(*Of Counsel for Respondent Judge H. Lamar Knight*)

PLEASE ADDRESS ALL COMMUNICATIONS TO:

DON A. LANGHAM
First Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334
Telephone: (404) 656-3392

CERTIFICATE OF SERVICE

I, DON A. LANGHAM, First Assistant Attorney General for the State of Georgia, do hereby certify that I have this day served the within and foregoing "Brief for Respondent Judge H. Lamar Knight in Opposition" upon Petitioner, prior to filing the same, by depositing a copy thereof, in the United States mail, postage prepaid, properly addressed to Petitioner's co-counsel of record, to wit:

RICHARD A. STRASER, ESQ.
1320 Ft. Myer Drive
Suite 812
Arlington, Virginia 22209

and

CAROLE SUZZANNE HOLMAN, ESQ.
Bank of Vienna Building
374 Maple Avenue East
Suite 302
Vienna, Virginia 22180

and in like fashion, I have served a copy of the same, upon co-Respondent's counsel of record, to wit:

CHARLES L. GOODSON, ESQ.
11 Perry Street
Newnan, Georgia 30263

and

TOMMY GREER, ESQ.
202 Tanner Street
P. O. Box 793
Carrollton, Georgia 30117

This _____ day of April, 1978.

DON A. LANGHAM
First Assistant Attorney General
(Of Counsel for Respondent
Judge H. Lamar Knight)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1242

PLEASANT RICHARD TALLY
(a/k/a DICK TALLY),
Petitioner,

versus

WILLIAM P. JOHNSON, et. al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS, WILLIAM P. JOHNSON AND AUBREY GILBERT, IN OPPOSITION

Robert D. Tisinger
202 Tanner Street
Post Office Box 798
Carrollton, Georgia 30117
(404) 834-4467
Member of the Georgia Bar and the Supreme Court of the United States

David H. Tisinger
202 Tanner Street
Post Office Box 798
Carrollton, Georgia 30117
(404) 834-4467

Charles L. Goodson
Post Office Box 1177
Newnan, Georgia 30264
(404) 834-4467
Member of the Georgia Bar and the Supreme Court of the United States

Thomas E. Greer
202 Tanner Street
Post Office Box 798
Carrollton, Georgia 30117
(404) 834-4467

Attorneys for Respondents,
William P. Johnson and Aubrey Gilbert

SCOFIELDS' QUALITY PRINTERS, P. O. BOX 53096, N. O., LA. 70153 · 504 822-1611

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

TABLE OF AUTHORITIES (Continued)

CONSTITUTIONS CITED

STATUTES CITED

RULES CITED

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No. 77-1242

PLEASANT RICHARD TALLY
(a/k/a DICK TALLY),
Petitioner,

versus

WILLIAM P. JOHNSON, et. al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS, WILLIAM P. JOHNSON AND AUBREY GILBERT, IN OPPOSITION

Respondents, Aubrey W. Gilbert and William P. Johnson respectfully request that the Supreme Court of the United States deny the Petition for Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fifth Circuit and Civil Action No. 77-2339, rendered on December 8, 1977, petition for rehearing and suggestion for rehearing en banc de-

nied, January 6, 1978, affirming the Judgment of the United States District Court for the Northern District of Georgia, Civil Action No. 77-359A, dismissing plaintiff's claim for relief against these respondents on the grounds that Civil Rights actions under *42 U.S.C. 1983*, may not be maintained against private attorneys participating in state court litigation.

OPINIONS BELOW

The judgment of affirmance of the United States Court of Appeals for the Fifth Circuit is attached to the Petition for Certiorari as filed by the petitioner and identified in petitioner's brief as Appendix A. Likewise the Order of the Fifth Circuit denying the petition for rehearing and the suggestion for rehearing en banc is attached to the Petition for Writ of Certiorari identified as Appendix B, pages 2a and 3a. In addition, petitioner attached to the Petition for Writ of Certiorari the decision of the United States District Court for the Northern District of Georgia identified in the Petition for Writ of Certiorari as Appendix C; as well as the Order denying the plaintiff's Motion to Alter or Amend the Judgment, identified as Appendix D in the Petition for Writ of Certiorari.

JURISDICTION

Respondents respectfully submit that while the petitioner is certainly entitled to apply for a Writ of Certiorari in the present matter, the present matter is not a proper case for the granting of a Petition for Writ of Certiorari. The petitioner's reliance on *Stump v. Sparkman*, Supreme Court 76-1750, is misplaced and,

in addition, petitioner has totally failed to deal with the well-established rule that private attorneys participating in state court litigation are not acting under color of state law for purposes of suit filed pursuant to *42 United States Code 1983*. The elaboration on the position taken by respondents is reserved for the Argument and Citation portion of this brief.

FEDERAL STATUTES

Federal Statutes involved in the present matter are:

1) *42 United States Code 1983* (R-53) which provides:

> "Every person who under color of any statute, ordinance, regulation, custom or usage of any state or territory subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit and equity or other proper proceedings for redress."

2) *Federal Rules of Civil Procedure, Rule 12(b)(6)*, which provides:

> "*Rule 12. Defenses and Objections — When and How Presented By Pleading or Motion — Motion for Judgment on Pleadings*
>
> (b) *How Presented.* Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-

> claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted, . . ."

STATEMENT OF THE CASE

(A) The Proceedings Below:

This action was originally filed in the United States District Court for the Northern District of Georgia under *Title 42 United States Code 1983*, the Civil Rights Act of 1871, on March 2, 1977, against William P. Johnson, Homer Williams and Aubrey W. Gilbert, alleging damage resulting from a fraudulent scheme allegedly perpetrated by the defendants (R-4). The respondents herein, William P. Johnson and Aubrey W. Gilbert, were named as a result of their representation as attorneys of the petitioner and his then wife in a divorce action in the Superior Court of Carroll County, Georgia. (R-4, et seq., 52, et seq.)

On March 28, 1977, the petitioner moved under Rule 15, 19, 20 and 21 to amend the original Complaint and to add as a party-defendant Judge Lamar H. Knight, the Judge in the State Court divorce action. On April 4, 1977, respondents herein, William P. Johnson and Aubrey W. Gilbert, answered the Amended Complaint, denying all the material allegations, alleging that petitioner's Complaint failed to state a claim upon which relief could be granted, and that the applicable

Statute of Limitations had expired. (R-61, et seq., 118, et seq.) These latter two defenses were also made the basis of a Motion to Dismiss petitioner's Complaint for failure to state a claim upon which relief could be granted pursuant to Rule 12(b)(6) of the *Federal Rules of Civil Procedure*. (R-66, 67 and 122) The respondents herein, William P. Johnson and Aubrey W. Gilbert, also filed briefs in support of the motions to dismiss. (R-68, et seq., and 123, et seq.)

On June 3, 1977, the United States District Court for the Northern District of Georgia, under authority of Rule 12(b) (6) of the *Federal Rules of Civil Procedure*, dismissed the petitioner's amended complaint as to all defendants, including the respondents herein, William P. Johnson and Aubrey W. Gilbert, for failure to state a claim upon which relief could be granted. (R-300) With regard to respondents, William P. Johnson and Aubrey W. Gilbert, the Court concluded:

> "Defendants, Gilbert and Johnson, (appellees herein) acted as the attorneys for the respective parties in the Tally divorce action in 1969. Said defendants were participating in private, state court litigation, were not acting under any color of state law, and cannot be held liable under *42 United States Code 1983*.
>
> *Hill v. McClellan*, 490 F.2d 859 (5th Cir. 1974)" (R-301)

The Court also rejected petitioner's contention asserting liability of the Judge and the attorneys on a theory of conspiracy contending that the Court was

without jurisdiction to hear the matter. The Court concluded:

> "Despite plaintiff's claims to the contrary it is clear that Judge Knight had jurisdiction over the divorce proceedings in question and was empowered to make a disposition of plaintiff's shareholdings in Style Crest under *Georgia Code Annotated* §30-203." (R-300, 301)

On June 13, 1977, petitioner moved to alter and amend the Judgment of the District Court. On June 28, 1977, the Court denied petitioner's motion to alter or amend its Judgment. (R-345)

On December 8, 1977, a panel of the United States Court of Appeals for the Fifth Circuit decided per curiam that the dismissal of the petitioner's amended complaint by the United States District Court for the Northern District of Georgia under Rule 12(b)(6) of the *Federal Rules of Civil Procedure* should be affirmed, and that decision was affirmed.

On January 6, 1978, a panel of the United States Court of Appeals for the Fifth Circuit denied the petition for rehearing and denied the suggestion for rehearing en banc.

On March 10, 1978, the United States Court of Appeals for the Fifth Circuit entered an Order denying petitioner's motion for a further stay of the issuance of the mandate of the Fifth Circuit. A copy of that Order is attached and identified as Appendix A.

(B) The Statement of Facts:

The respondent herein, William P. Johnson, acting as a private attorney in state court litigation, represented the former wife of the petitioner herein in a 1969 Georgia divorce action. Respondent herein, Aubrey W. Gilbert, acting as a private attorney in state court litigation, represented the petitioner in that same 1969 Georgia divorce action. The petitioner commenced this action seeking to recover from these private attorneys, and others, under *Title 42 United States Code 1983*, alleging a conspiracy by which he was deprived of his ownership in a certain corporation and deprived of the ability to earn a living. (R-52, et seq.)

Petitioner does not contend, and has never contended, that the Superior Court of Carroll County, Georgia, did not have jurisdiction to entertain his divorce proceedings. Neither does the petitioner contend that the Court lacked personal jurisdiction over the petitioner, as evidenced by the Sheriff's Certificate of Service. (R-317) Rather, the petitioner makes the rather novel contention that the Superior Court of Carroll County was without jurisdiction to transfer his interests in a certain corporation to his wife, simply because the Court did not have personal jurisdiction over the remaining shareholders in the corporation, or the corporation itself. (R-52, et seq., and 5th Circuit Brief of Petitioner, pp. 6, 7 and 9).

Respondents, William P. Johnson and Aubrey W. Gilbert, will expect to demonstrate by this brief that the action of the United States District Court for the

Northern District of Georgia was proper since an action under *Title 42 United States Code 1983* cannot be maintained against private attorneys participating in state court litigation, and because the Judge of the Superior Court was acting within his jurisdiction when he transferred the interest of the petitioner in a certain corporation to the petitioner's wife.

QUESTIONS PRESENTED

I.

CAN PRIVATE ATTORNEYS PARTICIPATING IN STATE COURT LITIGATION BE HELD LIABLE UNDER THE PROVISIONS OF TITLE 42 UNITED STATES CODE 1983, AND WAS THE COURT BELOW CORRECT IN AFFIRMING THE GRANTING OF RESPONDENTS WILLIAM P. JOHNSON AND AUBREY W. GILBERT'S MOTIONS TO DISMISS PETITIONER'S COMPLAINT, PURSUANT TO RULE 12(b) (6) OF THE FEDERAL RULES OF CIVIL PROCEDURE?

II.

CAN PRIVATE ATTORNEYS PARTICIPATING IN STATE COURT LITIGATION BE HELD LIABLE UNDER THE PROVISIONS OF TITLE 42 UNITED STATES CODE 1983, ON THE THEORY THAT THE JUDGE IN THE STATE COURT ACTION ACTED WITHOUT JURISDICTION, WHERE THE STATE COURT JUDGE CLEARLY HAD SUBJECT MATTER JURISDICTION AND IN PERSONAM JURISDICTION OVER THE INDIVIDUAL WHO IS THE PETITIONER IN THE PRESENT ACTION?

ARGUMENT AND CITATION OF AUTHORITY

I.

Can Private Attorneys Participating In State Court Litigation Be Held Liable Under The Provisions Of Title 42 United States Code 1983, And Was The Court Below Correct In Affirming The Granting Of Respondents, William P. Johnson And Aubrey W. Gilbert's Motion To Dismiss Petitioner's Complaint, Pursuant To Rule 12 (b) (6) Of The Federal Rules Of Civil Procedure?

An action cannot be maintained under *Title 42 United States Code 1983* against an attorney participating in private state court litigation. This action was brought against the respondents herein, and others, under *Title 42 United States Code 1983* alleging the violation of petitioner's civil rights. By its very terms, 42 U.S.C. 1983, requires that a defendant in a suit pursuant to this provision must have been acting under color of statute or color of law. Specifically, *42 United States Code 1983*, provides:

> "Every person who under color of any statute, ordinance, regulation, custom or usage of any state or territory subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit and equity or other proper proceedings for redress."

The courts have uniformly held that an attorney participating in private state court litigation is not acting under color of state law within the meaning of this statute and cannot be held liable under the provisions of this statute. In the Fifth Circuit case of *Hill v. McClellan*, 490 F. 2d 859 (5th Cir. 1974), that Court concluded:

> "Lawyers who participate in the trial of private state court litigation are not state functionaries acting under color of state law within the meaning of the Federal Civil Rights Act and are not liable under said act for their actions in such litigations. 42 United States Code 1983."

The cases are legion which support this proposition. In fact no case has been found which would allow such an action to be maintained against an attorney in this setting.

For a case strikingly similar to the present case, see *Dotlich v. Kane*, 497 F. 2d 390 (8th Cir. 1974). As in the present case, the Eighth Circuit in the *Dotlich* case, supra, was confronted with a suit filed under *42 United States Code 1983* and arising out of representation by the defendant, attorney, in a divorce proceeding in the state court. Also, like the present case, the Court had transferred the husband's interest in certain property to the wife. The Eighth Circuit concluded that the Court below acted properly in dismissing the attorney as a party and stated:

> "An attorney who represented a wife in a divorce proceeding was not acting under color

> of state law within the meaning of the Civil Rights Act and thus could not be subject to civil rights actions seeking injunctive, declaratory and monetary relief in regard to a court order in a divorce proceeding requiring the husband to transfer all title and interest in his and his wife's homestead to his wife. *42 United States Code 1981-1986.*"

Petitioner, however, contends that respondents, privately retained attorneys, conspired with defendant Judge Lamar H. Knight, to deprive him of certain property and liberty in violation of *42 United States Code 1983*. Petitioner does not allege sinister meetings and a formal conspiratorial agreement; rather, he assumes the conspiracy from what he contends to have been an absence of jurisdiction on the part of the Court. However, as the Ninth Circuit indicated in the case of *Haldane v. Chagnon*, 345 F. 2d 601 (9th Cir. 1965):

> "Attorneys who appeared in a divorce action and who were consulted by the Judge who then initiated proceedings to detain the husband for observation as to his mental health, have not acted in conspiracy with a state officer against whom the husband could state a valid claim and had not committed any wrongful acts which would subject them to liability under this section."

The complaint in the present matter reveals on its face that respondents, William P. Johnson and Aubrey W. Gilbert, were privately retained attorneys and con-

sequently this case is within the decision cited above and is not maintainable against these respondents under *Title 42 United States Code 1983*. For additional cases which reemphasize the propositions outlined above, see: *Kenney v. Fox*, 232 F. 2d 288 (1956), Cert. Denied, 352 U.S. 855; *Nelson v. Stratton*, 469 F. 2d 1155 (5th Cir. 1972), Cert. Denied, 410 U.S. 957; *Szijarto v. Legeman*, 466 F. 2d 864 (9th Cir. 1972); *Steward v. Meeker*, 459 F. 2d 669 (3rd Cir. 1972); *Meier v. State Farm Mutual Auto Insurance Company*, 356 F. 2d 504 (7th Cir. 1976), Cert. Denied, 385 U.S. 875.

The other cases which support the proposition identified above are too numerous to list and as previously stated, no case has been found contrary to this proposition. Also as indicated, petitioner's complaint revealed on its face that respondents William P. Johnson and Aubrey W. Gilbert were privately retained attorneys participating in private state court litigation. However, the same rule applies whether attorneys are retained or appointed. *See: Szijarto v. Legeman*, supra, and *Shelton v. Randolph*, 373 F. Supp. 448 (D.C. Va. 1974).

Indulging all inferences in favor of the petitioner, it is nonetheless abundantly clear that an action under *Title 42 United States Code 1983* cannot be sustained against respondents, William P. Johnson and Aubrey W. Gilbert, for the reasons stated above and consequently the Court below did not err in granting these respondents' Motions to Dismiss petitioner's complaint for failure to state a claim upon which relief could be granted.

II.

Can Private Attorneys Participating In State Court Litigation Be Held Liable Under The Provisions Of Title 42 United States Code 1983, On The Theory That The Judge In The State Court Action Acted Without Jurisdiction, Where The State Court Judge Clearly Had Subject Matter Jurisdiction And In Personam Jurisdiction Over The Individual Who Is The Petitioner In The Present Action?

In an attempt to circumvent the authority cited in the preceding portion of this brief, petitioner argues that the cases cited above do not apply where the state court was without jurisdiction as an initial matter. Petitioner makes a very unusual and respondents submit, unsupportable argument. Petitioner does not contend that the state court was without jurisdiction to entertain the divorce. Neither does petitioner contend that the court lacked personal jurisdiction over the petitioner. Rather, the petitioner contends that the state court lacked jurisdiction to order a transfer of his interest in the corporation to his wife because the state court did not have in personam jurisdiction over all other shareholders in the corporation and the corporation itself. (See Petitioner's Fifth Circuit Brief, pp. 6, 7 and 9)

The reasonable mind cannot question the presence of jurisdiction in the state court action. The Georgia Constitution as embodied in *Georgia Code Annotated* §2-3901, confers jurisdiction to hear divorce proceedings upon the superior courts in the state. That is not questioned by any party to this action. Moreover, the

superior court is awarded jurisdiction to make dispositions of property and awards of alimony in divorce proceedings. *Georgia Code Annotated* §30-202, provides:

> "*30-202. Proceedings to obtain temporary alimony.* Whenever an action for divorce, at the instance of either party, or a suit by the wife for permanent alimony, shall be pending, the wife may, at any regular term of the court in which the same shall be pending, apply to the presiding judge, by petition, for an order granting to her temporary alimony pending the cause; and, after hearing both parties and evidence as to all the circumstances of the parties and as to the fact of marriage, the court shall grant an order allowing such temporary alimony including expenses of litigation, as the condition of the husband and the facts of the case may justify."
> [See also: *Georgia Code Annotated* §30-203.]

Finally, the record itself establishes proper service and in personam jurisdiction over the petitioner for purposes of that state court divorce action. (R-317) Consequently, it is difficult to see how the state court lacked jurisdiction in the present case.

Counsel for the petitioner argues by analogy and insists that the action of the state court in Georgia was tantamount to transferring ownership and control of Ford Motor Company based only on in personam jurisdiction over Henry Ford in a divorce proceeding. Counsel's analogy is inappropriate. There is no authority, and counsel cites none, which would prevent that divorce court from transferring Henry Ford's interests in the Ford Motor Company to his wife. In fact, that type of action by a state court would be sanctioned by the provisions cited above if the court had personal jurisdiction over Henry Ford, as it had over the petitioner in the present matter.

PETITIONER'S RELIANCE ON STUMP V. SPARKMAN, PRESENTLY BEFORE THIS COURT ON CERTIORARI.

The Seventh Circuit, in *Sparkman*, supra, found that the Indiana State Court Judge could not be judicially immune from liability under the Federal Civil Rights statutes where there was no statute authorizing the particular action taken by the state court judge. While this court has not, at this point, decided the validity of the Seventh Circuit decision, the facts of that case are vastly different from the facts in the present case, where the state court judge acted pursuant to a specific statute authorizing him to make dispositions of property in divorce actions. (See: *Georgia Code Annotated* §30-202 and 30-203.)

That the state court in the present matter had personal jurisdiction over the petitioner has not been questioned and the authority of that state court to award certain of petitioner's property as alimony cannot be seriously questioned. It is therefore abundantly clear that the state court in the divorce proceedings did act with proper jurisdiction, rendering petitioner's already tenuous argument totally inapplicable.

CONCLUSION

In summary, respondents William P. Johnson and Aubrey W. Gilbert, rely on the general rule as announced by the Fifth Circuit and in numerous other decisions cited in this brief, that private attorneys participating in private state court litigation do not act under the color of state law and cannot be held liable under *42 United States Code 1983*. The petitioner attempts to create a theory by which these respondent attorneys would be derivatively liable based on a theory that the state court judge was acting without jurisdiction. As an initial matter, not a single case has been found which could even be remotely cited as authority for that proposition.

Secondly, petitioner does not contend that the state court in Georgia did not have jurisdiction to entertain divorce proceedings and, likewise, he does not contend that the court lacked personal jurisdiction over him. Rather, the petitioner contends that the court was without jurisdiction to order a transfer of his interests in the corporation simply because the court lacked jurisdiction over the remaining shareholders in the corporation and the corporation itself. This proposition is void of support in the law. Respondents, William P. Johnson and Aubrey W. Gilbert, have demonstrated that the state court of Georgia had jurisdiction to entertain the divorce proceedings, had personal jurisdiction over the petitioner herein and was authorized to transfer petitioner's interests in the corporation by decree of divorce.

For the foregoing reasons, respondents William P. Johnson and Aubrey W. Gilbert, respectfully request that the Petition for Writ of Certiorari be Denied.

Respectfully submitted,

CHARLES L. GOODSON
Attorney for Respondent,
Aubrey W. Gilbert
Post Office Box 1177
Newnan, Georgia 30264

(404) 253-3880

ROBERT D. TISINGER
DAVID H. TISINGER

THOMAS E. GREER

Attorneys for Respondent,
William P. Johnson
202 Tanner Street
Post Office Box 798
Carrollton, Georgia 30117

(404) 834-4467

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-2339

PLEASANT RICHARD TALLY,
a/k/a DICK TALLY,
Plaintiff-Appellant,

versus

WILLIAM P. JOHNSON, ET AL.,
Defendants-Appellees.

ORDER:

(X) IT IS ORDERED that the motion for a further stay of the issuance of the mandate is DENIED.

/s/ PETER FAY
UNITED STATES CIRCUIT
JUDGE

[Filed: May 10, 1978]

CERTIFICATE OF SERVICE

I, Thomas E. Greer, Attorney for the Respondent herein, in the above entitled cause of action, do hereby certify that three copies of the above and foregoing brief ON FETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (BRIEF OF RESPONDENTS, WILLIAM P. JOHNSON AND AUBREY GILBERT, IN OPPOSITION) has been forwarded to attorneys for all parties in this case, to-wit:

Bushrod Corbin Washington, Jr.
2509 Popkins Lane
Alexandria, Virginia 22306

Richard A. Straser
1320 Ft. Myer Drive
Suite 812
Arlington, Virginia 22209

Carole Suzzanne Holman
Bank of Vienna Building
374 Maple Avenue East
Suite 302
Vienna, Virginia 22180

[Attorneys of Record for Petitioner, Pleasant Richard Tally a/k/a Dick Tally]

Sam D. Price
Johnson & Beckham
Post Office Box 414
306 Tanner Street
Carrollton, Georgia 30117

[Attorney of Record for Respondent, Homer Williams]

by first class mail, with proper postage affixed thereon.

This the ____ day of April, 1978.

THOMAS E. GREER